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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

BLUE DIAMOND COAL COMPANY, A CORPORATION
Respondent.[1]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, United Mine Workers of America, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered December 15, 1970, in Case No. 19,589, styled *Blue Diamond Coal Company, a corporation, Plaintiff-Appellee* v. *United Mine Workers of America, Defendant-Appellant,* wherein the Sixth Circuit affirmed the judgment entered in the United States

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[1]Herein the United States Court of Appeals for the Sixth Circuit is called *"Sixth Circuit"*; the United States District Court for the Eastern District of Kentucky (at Jackson), *"trial court"* or *"district court"*; United Mine Workers of America, *"UMW"* or *"petitioner"*; and Blue Diamond Coal Company, *"Blue Diamond"*.

All emphases herein are supplied, unless otherwise indicated.

District Court for the Eastern District of Kentucky (at Jackson), after reducing that court's judgment from $281,990.57 to $247,894.78.

A certified record in said case, including proceedings in the Sixth Circuit, is furnished herewith, in accordance with this Court's Rules.

OPINION BELOW

The Sixth Circuit's opinion, per Senior Circuit Judge O'Sullivan, and the concurring opinion of Circuit Judge McCree, with whom Circuit Judge Celebrezze joined, "concurring in the result", appear in Appendix A hereto (A. 1-29a),[2] and in the certified record, but are as yet unreported in the Federal Reporter.

The district court issued no opinion.

JURISDICTION

The judgment of the Sixth Circuit was entered on December 15, 1970. This petition for certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 USCA 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Where (1) the settlement of disputes section of collective bargaining agreements antedating 1950 provided that Mine Workers shall not engage in a work stoppage pending settlement of disputes under grievance machinery procedures and such agreements contained

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[2]The abbreviation "A. ___", followed by a page number, refers to the Appendix to the instant Petition. Other references indicated by the abbreviation "R. ___" refer to items in the certified record as numbered by the lower courts.

The abbreviation "T. ___", followed by a page number, refers to the Transcript of Testimony and Proceedings in the trial court which is part of the certified record in this Court's Clerk's office.

other "no strike" clauses, and (2) under the Labor Management Relations Act, 1947, as amended, the right to strike became a bargainable subject, and (3) in 1950 UMW and coal operators signatories to the National Bituminous Coal Wage Agreement of 1950 deleted such clauses therefrom and expressly covenanted that the "no strike" and related clauses in prior agreements were rescinded and made null and void, and (4) signatories to said 1950 Agreement covenanted that stoppages, as well as disputes, shall be settled exclusively under grievance machinery procedures set forth in such contract, and (5) signatories to said Agreement as amended in 1952 and 1958 carried forward therein the 1950 Agreement's express covenants that the "no strike" and related clauses in prior agreements were rescinded and made null and void and deleted both the provision contained in the 1950 Agreement that stoppages shall be settled under the grievance machinery procedures and the provision that settlement by such procedures shall be the exclusive method, are stoppages of work pending settlement of disputes under the grievance procedures proscribed by the 1958 Agreement so as to constitute a violation thereof and to subject UMW to damage actions under the Act's Section 301?

2. In the event that Question 1. is answered in the affirmative, did the Sixth Circuit err in ignoring and impliedly overruling the holding in *Lewis* v. *Benedict Coal Corp.*, 6 Cir., 259 F.2d 346, that under the National Bituminous Coal Wage Agreement, the right to strike was preserved with respect to all disputes not subject to settlement by other methods made exclusive by the National Agreement?

3. Did the Sixth Circuit err in approving the district court's rejection of UMW's proffered instructions to the

jury concerning (1) the preponderance of evidence, (2) UMW's non-responsibility for spontaneous and wildcat strikes and (3) UMW's contention that said work stoppages were permissive under the 1958 Agreement?

4. Did the Sixth Circuit err in approving the district court's rejection of UMW's proffered instruction that remote, uncertain or speculative damages could not be recovered and in approving the district court's failure to include a judicial standard to guide the jury in its damage award?

5. Under applicable law, was there substantial evidence to warrant the jury's verdict under the Act's Section 301 that (1) the several work stoppages violated the National Bituminous Coal Wage Agreement of 1950, as amended in 1958, (2) UMW was responsible for the several work stoppages, and (3) liable for the amount of damages entered against UMW by the Sixth Circuit?

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions involved are Labor Management Relations Act, 1947, as amended (called "Act"), Sections 7, 13, 502 and 301, subsections (a), (b) and (e) [29 USCA 157, 163, 143 and 185(a), (b) and (e)], which appear in Appendix B herein (A. 32a).

STATEMENT OF THE CASE

A. The Pleadings, Trial Proceedings and the Sixth Circuit's Judgment.

Blue Diamond instituted the instant district court action under the Act's Section 301 for damages for an alleged breach of the National Bituminous Coal Wage Agreement of 1950, as amended in 1958.[3]

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[3]The National Bituminous Coal Wage Agreement of 1950 (A. 41-45a) will be called the "1950 Agreement", the 1950 Agreement as amended September 29, 1952 (A. 45-47a), the "1952 Agreement" and the 1950 Agreement as amended effective December 1, 1958, the "1958 Agreement". *(Footnote continued on next page)*

The jury's verdict, and the district court's judgment thereon, were based upon allegations that UMW breached the 1958 Agreement by embarking upon and initiating "a deliberate program, plan and course of conduct wherein its members", Blue Diamond employees, engaged in a series of work stoppages, refusals to work or perform tasks of their employment, slow-downs, intentional and planned inefficiencies, contrived reductions in the volume of coal production, and other harrassing and injurious tactics, all of which UMW's Answer denied (R. 8).

In a jury trial, UMW moved for directed verdicts at the conclusion of Blue Diamond's evidence in chief and at the conclusion of all evidence (T. 618-24, 1115); both were denied (T. 645, 1121). UMW offered, but the district court refused to give, as offered, Instructions Nos. 1 through 5, 5a-5g and 6 through 10 (T. 1121-23, 1173-80), to which UMW excepted (T. 1203-04). UMW's objections to the trial court's jury charge were likewise overruled (T. 1197-98, 1203-07).

The jury awarded Blue Diamond $281,990.57 for "strike" damages; but awarded it no damages because of "any slowdown" (T. 1214).

Based upon the jury's verdict, the district court, on March 27, 1968, entered judgment in favor of Blue Diamond and against UMW for "$281,990.57 as 'strike' damages", with interest and costs, but the judgment also provided Blue Diamond "take nothing as relates to its claim for 'slowdown' damages, and that its claim in the action for 'slowdown' damages be dismissed on the merits" (R. 60).

The trial court sustained UMW's motion for summary judgment based upon Blue Diamond's Count One for alleged secret agreements between UMW and Blue Diamond's business competitors for $21,500,000 (R. 36). By reason thereof, no detail of Count One is included in the Statement of the Case.

Motions for judgment in accordance with directed verdict or, in the alternative, for a new trial, assigning grounds (R. 62), were overruled (R. 67). Upon appeal the Sixth Circuit, by judgment entered December 15, 1970, affirmed the district court's judgment, after reducing its judgment from $281,990.57 to $247,894.78.[4]

B. The Facts and the Sixth Circuit's Opinion

Blue Diamond, a coal producer in eastern Kentucky, operates its Leatherwood Mines Nos. 1 and 2 in Perry County, about 10 miles apart (T. 76). UMW, a labor organization, represents Blue Diamond employees as collective bargaining representative. Blue Diamond and UMW are signatories to the National Bituminous Coal Wage Agreement of 1950, as amended in 1958 (T. 57), which was effective when the strikes involved allegedly occurred. Blue Diamond's assertion that the strikes violated the 1958 Agreement necessitates examination of pertinent provisions thereof.

1. As to Whether the Strikes Were Violative of the Collective Bargaining Agreement.

a. Collective bargaining agreements antedating 1947 contained waivers of the right to strike.

Collective bargaining agreements in the bituminous coal industry, antedating 1947, contained specific waivers of coal miners' rights to strike. The Southern Wage Agreement of 1941 (A. 34-37a) mandated that (A. 36a):

> "Pending the hearing of disputes, the Mine Workers shall not cease work because of any dispute"

and that

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[4] Judgments entered by the Sixth Circuit and the district court are to be found in Appendix A herein, pp. 30-31a.

> "A strike or stoppage of work on the part of the Mine Workers shall be a violation of this Agreement" (A. 36a)

and that

> "Under no circumstances shall the Operator discuss the matter under dispute with the Mine Committee or any representative of the United Mine Workers of America during suspension of work in violation of this Agreement" (A. 36a).

Likewise, the 1945 Agreement (A. 41a) declared that

> "For the duration of this Agreement no strikes shall be called or maintained hereunder."

b. The 1950 Agreement expressly repealed the no-strike and related clauses of earlier contracts.

By specific recitals in the 1950 Agreement, terms of certain antecedent agreements in the bituminous coal industry were carried forward, subject to the terms and conditions of the 1950 Agreement (A. 41-42a);[5] but it *expressly repealed and cancelled* the no-strike and related clauses of the 1941 and 1945 Agreements (A. 44a).

Whereas the 1941 Agreement's "Settlement of Disputes" section commanded that "Pending the hearing of disputes, the Mine Workers shall not cease work because of any dispute" (A. 36a), and "there shall be no suspension of work on account of" disputes (A. 36a), no

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[5]These were:

(1) the Appalachian Joint Wage Agreement of 1941 (A. 34-37a),

(2) the Supplemental Six-Day Work Week Agreement (A. 40a),

(3) the National Bituminous Coal Wage Agreement of 1945 (A. 40-41a), and

(4) all various District Agreements based upon the aforesaid basic Agreements as such district agreements existed on March 31, 1946—but all "subject to the terms and conditions of the 1950 Agreement and as amended, modified and supplemented" thereby.

such proscription against stoppages is found in the corresponding disputes section of the 1950 Agreement. The proscription against coal operators' negotiating any dispute during a work suspension, found in the 1941 Agreement (*ante*, pp. 6-7), was also omitted from the 1950 Agreement.

Moreover, the other limitations upon the right to strike contained in the 1941 and 1945 Agreements were likewise cancelled under the 1950 Agreement's terms. Subsections 1, 3 and 4 of the "Miscellaneous" section of the 1950 Agreement read thus (A. 44-45a):

> "1. Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any 'no strike' or 'Penalty' clause or clauses or any clause denominated 'Illegal Suspension of Work' are hereby rescinded, cancelled, abrogated and made null and void.
>
> * * * * * *
>
> "3. The contracting parties agree that, as a part of the consideration of this contract, *any and all disputes, stoppages, suspensions of work and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the 'Settlement of Local and District Disputes' section* of this Agreement; or, if national in character, by the full use of free collective bargaining as heretofore known and practiced in the industry.
>
> "4. The United Mine Workers of America and the Operators signatory hereto affirm their intention to maintain the integrity of this contract and *to exercise their best efforts through available*

> *disciplinary measures* to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this Agreement."

The 1950 Agreement contained no express waiver or limitation of the right to strike.

c. The 1952 Agreement continued the repeal of the no-strike and related clauses.

In negotiating the 1952 Agreement (A. 45-47a), UMW preserved the deletion and repeal of the "no-strike", "fines", "indemnity", "guarantee" and "penalty" clauses but amended the 1950 Agreement by expunging the provision that stoppages were to be "settled and determined *exclusively* by" the grievance machinery procedures and released UMW from the 1950 "best efforts" obligation by striking the "best efforts" clause. Instead the 1952 Agreement provided (A. 46-47a):

> "3. The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the Courts."

The parties thus agreed that (1) the grievance machinery no longer was to constitute the exclusive method for stoppages and settlement of disputes, and (2) there was

no UMW obligation to use its best efforts regarding strike activity.

d. The 1958 Agreement continued the repeal of the no-strike and related clauses.

Except as therein amended, the 1958 Agreement carried forward the terms of the National Bituminous Coal Wage Agreements of 1950 and 1952, "and all previous Agreements as therein provided" (A. 47a). The 1950 Agreement, in turn (except as therein amended), carried forward the terms of the 1941 and 1945 Agreements, the Supplemental Six-Day Work Week Agreement, and all District Agreements based upon said basic agreements as they existed on March 31, 1946 (A. 41-42a).

The Sixth Circuit's Opinion

Despite the 1958 Agreement's express elimination of UMW's waiver of the right to engage in work stoppages, the Sixth Circuit rejected UMW's contention[6] and adhered to its *Lewis* v. *Benedict Coal Corp.*, 259 F.2d 346 (1958) and this Court's affirmance thereof "by an equally divided Supreme Court, 361 U.S. 459 (1960)", that the express elimination of the "no strike" clause "did not render unenforceable the above expressed obligation to settle *all* disputes through the current contracts".[7] The Sixth Circuit characterized its adherence to *Benedict* and its agreement with the dissent[8] in *International Union,*

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[6]In the trial court, in UMW proffered instructions, in exceptions to the jury charge, in motions for directed verdict (T. 1173-80, 1197-1207, 618-24, 1114) and motions for n.o.v. or for new trial (R. 62), petitioner asserted the strikes were not violative of the 1958 Agreement.

[7]When petitioner herein sought review by this Court of *Lewis* v. *Benedict*, 259 F.2d 346, as to its holding concerning both the 1950 and 1952 Agreements, the opinion in which had been written by this Court's Justice Stewart Potter—then of the Sixth Circuit, this Court *limited* review to the *1950 Agreement* (359 U.S. 905).

[8]The Sixth Circuit's opinion noted that the dissent was that of "Mr. Chief Justice Burger, then a member of the District of Columbia Circuit" (A. 7-8a).

UMWA v. *NLRB*, D.C. Cir., 257 F.2d 211 (1958) as "consonant with the Supreme Court's emphasis in *United Steel Workers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95 (1962), of the high good of substituting employment of grievance procedures and arbitration for the warfare of strikes" (A. 8a).

Though recognizing *Benedict* (259 F.2d 346) "expressly stated that the 'no strike' provisions of the previous contracts were superseded" (A. 6a), the Sixth Circuit ignored *Benedict's* further holding that the right to strike was expressly preserved in the 1950-52 agreement "with respect to all disputes not subject to settlement by other methods made exclusive by the agreement" (259 F.2d 351). Conceding the 1950 Agreement provided that disputes were to be settled *exclusively* by the grievance procedures and that the 1958 Agreement under consideration *had eliminated the word "exclusively"*, the Sixth Circuit nonetheless did "not consider that the elimination of such word, any more than the express abrogation of the 'no strike' clauses in *Benedict Coal*, rendered the clear language of the contract before us—that disputes *shall* be settled through the grievance procedure—mere words of exhortation" (A. 6a).[9]

The Sixth Circuit regarded the contract's provision for settlement of disputes made "clear that it is not necessary that this Court speculate or make a finding as to the objective of abrogating the earlier 'no strike' clause and the elimination of the word 'exclusively' " (A. 9a). As in *Benedict* (259 F.2d 351), wherein it was held "the Unions remained free from liability for spontaneous or

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[9]Emphasis is found in the Sixth Circuit's opinion. This is true of all other places in the Petition where the quoted language appears.

'wildcat' strikes", the Sixth Circuit declared that "Nothing herein is intended to hold that the bargaining contract should be read as imposing liability upon UMW for spontaneous or wildcat strikes in which it had no part by way of causing or prolonging such strikes" (A. 9a); but the Sixth Circuit herein significantly avoided *Benedict's* definition of spontaneous or wildcat strikes as "the kind of 'stoppages' and 'suspension of work' *which the agreement made subject to the settlement procedure therein provided*" (p. 351). The relevancy of the Sixth Circuit's omission is emphasized by its having sanctioned a money judgment for work stoppages which were *excluded* under *Benedict's* definition aforesaid.

2. Issue Relating to Whether UMW Was Responsible for the Strikes.

Under UMW's Constitution, the International Union in Convention is supreme (T. 339). It is divided into geographic districts, one of which is District 30, whose officers are appointed by the International Union (T. 338); its policies are controlled by and coincide with UMW's Constitution and policy (T. 340); and during the periods involved herein, C. E. Beane was its President and International Board Member (T. 646). In District 30, Bill Perkins was UMW International Representative, working under Beane's supervision and direction (T. 770); Squire Feltner was a District 30 field representative (T. 655, 726); and both Beane and Perkins were paid by UMW (T. 349).

No District is permitted to engage in a strike involving all or a major portion of its members without sanction of the International Convention or the International Executive Board (T. 347). Between Conventions, the

supreme executive and judicial powers are vested in UMW's executive officers and Executive Board (T. 342).

Local unions, under UMW's Constitution, may adopt such laws for their government as do not conflict with International or District laws or rulings, or Joint Agreements (T. 344). Local Union No. 8280 was chartered by UMW on February 6, 1948 (T. 894-95). Its officers are elected by members of the Local Union.

The Mine Committee is a creature of the collective bargaining agreement and derives its authority therefrom (T. 673, 973). Its members are elected by a majority vote of local union members (T. 673); they are not local union officers; and neither UMW nor District 30 has anything to do with the selection of its membership (T. 673, 973).

During 1962 and 1963, Willie Couch was Local Union president (T. 893, 896); Wayne Dixon and Boyd Couch were mine committeemen (T. 206-07), as was Raymond Tipton in February, 1962 (T. 974).

a. The alleged strike activity and the Sixth Circuit's holdings relative thereto.

Blue Diamond grounded UMW's responsibility upon six alleged strikes. The Sixth Circuit held the evidence sufficient to permit the jury to award damages "for the several work stoppages, except those which occurred on May 22 and 23, 1962, August 24, 1962, and October 1, 1962" (A. 19a),[10] rejecting UMW's contention that it

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[10]The dates and characterization of the three remaining strikes are as follows:

May 29, 30 and 31, 1962 and June 1 and 4, 1962	—	Blue Diamond's breach of agreement
December 3-7, 1962	—	Roving picket activity
January 8-25, 1963	—	Picketing of No. 1 mine by employees at No. 2 mine

had not authorized, called, participated in or ratified any of said strikes, and in each of said strike situations had actively urged the men to return to work.

Of the three stoppages in which the Sixth Circuit exonerated UMW, the Sixth Circuit declared "there was not sufficient evidence from which a jury could find that they were otherwise than spontaneous stoppages, not chargeable to" UMW (A. 16a).

Discussion of the three work stoppages for which the Sixth Circuit has held UMW liable follows:

(1) The May 29-June 4, 1962 work stoppage

On May 29, 1962, a work stoppage occurred and continued until June 4, 1962. Though the Sixth Circuit did not specifically attribute the stoppage to an incident on May 28, its opinion points to a meeting on that date when Perkins, a UMW representative for District 30, came to the meeting and inquired if Blue Diamond planned to return a discharged employee to work and, receiving a negative reply, Perkins, with the Mine Committee and Local president, left without further discussion (A. 12-13a). Undisputed evidence is that the stoppage occurred because of Blue Diamond's breach of its agreement to use helpers on loading machines (T. 773, 1078). Uncontradicted evidence is UMW had nothing to do with the stoppage (T. 1001). A Blue Diamond witness admitted Perkins said nothing about a strike "but that was my understanding of it" (T. 178).

In addition to evading these undisputed facts, the Sixth Circuit ignored totally other indisputably valid and supported evidence that UMW had no notice of any stoppage until May 30, as well as corroborated evidence of UMW's activity in successfully causing the men to return

to work and resolve any grievance in accordance with the contract,"[11] even after the employees had "voted against going to work" (T. 666, 669, 774). As an employee related concerning UMW efforts, "If we don't obey their orders, I don't lay the blame on the International" (T. 1001) because "It was the members there at No. 1" (T. 1002).

(2) The December 3-7, 1962 work stoppage

Undisputed evidence is that prior to December 1, 1962, roving pickets closed down mines throughout District 30[12] and early in December picketed Leatherwood Mine No. 1, as well as other mines, for four to six days. Leaders of the pickets were non-UMW members, had no authority (T. 676-77, 778-79), and were not representing UMW (T. 941). There were rumors that the UMW Welfare and Retirement Fund had changed its rule so that a beneficiary out of work for one year lost his hospital card, which affected approximately "a thousand cards in the Hazard Field" (T. 780) and one picket was telling the men they could recover these cards through picketing (T. 676, 780).

A December 3 letter from Beane to each Local Union officer in District 30 advised that the leaders had no authority; that they were unauthorized to act in behalf of either UMW or the District; it was detrimental to the Union; if local unions had had or knew of any UMW members participating in the picketing group they should "be advised to stop their activities" (T. 678). This letter was directed not only to Local Union 8280 but to all officers and members in District 30 (T. 677-78).

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[11] T. 661, 666-70, 978, 1051-52.

[12] T. 927, 1053-54, 1083, 1091-92.

Another letter, dated December 11, 1962, was broader in scope because of the District's learning that roving picket leaders were telling UMW members they were speaking for and representing UMW (T. 678-79). The December 11 letter reiterated that the pickets had no authority to act for either UMW or District 30 and advised that UMW members "should refrain from recognizing these roving pickets" and declared its contents had been approved by UMW's International officers (T. 679). It was read at a Local Union meeting (T. 992-94, 1029).

In addition to the two letters, Beane made a short radio speech on December 4 and met with members at Leatherwood No. 1 "at least once and maybe twice" and had both Perkins and Feltner "to stay on that issue continually", and all three tried to encourage the employees to disregard the picket line and go to work—advice they would not accept (T. 679-80, 780-82). Verification of Beane's presence and instruction "to get back to work" because the picket line was unauthorized, is established by employees Dixon and Estridge (T. 1029, 1055).

Blue Diamond employees testified that Beane, Perkins and Feltner told them to cross the picket line and go to work because the line was unauthorized (T. 980, 1028). Local President Couch and other employees explained their refusal to work because they "wouldn't cross the picket line".[13]

Perkins contacted Local Union officers Couch and Dixon, requested them to ask the men to go back to work, and continuously pleaded "with the Local officers to go back to work", telling them to honor the contract, which they finally did (T. 778).

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[13]T. 942, 943-44, 958, 979, 1000, 1027, 1054.

While Blue Diamond witnesses saw Perkins "come by" the picket line "a couple of times", when Willie and Boyd Couch would get in the car with him, neither of the witnesses heard what was said, nor did the two Couches report what Perkins had said (T. 210-11, 268-69).

Perkins recalled that Beane had asked him to talk with Local officers to get the men back to work and that on occasions he would find a Local officer where picketing was occurring and he (Perkins) would "get him in the car" and "ask him what about trying to get the men back to work" (T. 780-81), explaining that if he talked to the officers in the men's presence he would encounter their shouting "We are not going back" (T. 781). There is employee agreement neither UMW nor District representatives directed employee participation in the stoppage (T. 958-59).

Other than to recite that "Beginning on December 3, 1962, there was another strike lasting five days" (A. 15a), the Sixth Circuit's opinion is silent concerning the facts above recited relating to the December 3-7 stoppage other than to concede that "the head office in Washington was directing Perkins and others to have the men go back to work". Nonetheless, the Sixth Circuit declared it was "satisfied that the total evidence was sufficient to cast responsibility for the December" strike upon UMW and that "there was evidence from which the jury could affix responsibility therefor" upon UMW (A. 16a).

(3) The January 8-25, 1963 work stoppage

Blue Diamond, in November, 1962, had cancelled its UMW contract covering its employees at Leatherwood Mine No. 2, who came to Leatherwood Mine No. 1 in January, 1963 and picketed the employees there (T. 680,

951). No agreement concerning the picketing existed between the men working at the two mines (T. 1031). No. 1 employees refused to cross the picket line (T. 980-81, 1055, 1031, 1084) although both Perkins and Feltner urged them "to get back to work" and told the men the picket line was unauthorized (T. 981, 1033, 1056). At Beane's instance, Couch and Dixon visited at Beane's office with UMW International Board members Carson Hibbitts and George Titler who, according to Dixon, advised they tell the men the picket line was unauthorized and "we must get our men to cross it, and return to work" (T. 1032, 1085). These instructions were relayed to Local Union 8280 members (T. 1032).

Perkins and Feltner were unsuccessful in their efforts to get the No. 1 employees to cross the picket line. It was not until the two mines' Local officers, in joint meeting, met with Beane, Perkins and Castle, a District field representative, where the No. 2 group agreed to withdraw its pickets at No. 1 and subsequently employees at the No. 1 Mine returned to work.

Blue Diamond witnesses charged that Perkins stated, with reference to strikes, "he would tell them they would have to go back to work, but they could read between the lines" (T. 207, 231, 273, 286-87), which one witness stated meant to him that "We didn't go back to work" (T. 209). Only one witness indicated the time the statement was made and he placed it as being before Christmas, 1963 (T. 251). Perkins and other witnesses denied the charge (T. 786, 966, 1031, 1085).

As in the case of the December 3-7 stoppage (*ante*, p. 15), the Sixth Circuit, ignoring the undisputed evidence concerning efforts of UMW and Local officers and District representatives above discussed, but conceding

"the head office in Washington was directing Perkins and others to have the men go back to work" (A. 16a), declared it was "satisfied that the total evidence was sufficient to cast responsibility for" the January, 1963 strike upon UMW and was "satisfied that there was evidence from which the jury could affix responsibility therefor" upon it (A. 16a).

(4) The December, 1962 and January, 1963 stoppages were not subject to settlement under the grievance machinery procedures.

In the Sixth Circuit, UMW contended the December, 1962 and January, 1963 stoppages were not disputes subject to settlement under the grievance machinery procedures under *Benedict.* The Sixth Circuit's opinion is unresponsive to this contention even though it proclaimed its adherence to *Benedict* and held *"Nothing* herein is intended to hold that the bargaining contract should be read as imposing liability upon UMW for spontaneous or wildcat strikes in which it had no part by way of causing or prolonging such strikes" (A. 9a).

C. The Issue of Instructions to the Jury and the Sixth Circuit's Opinion.

1.

The Sixth Circuit panel (Senior Circuit Judge O'Sullivan and Circuit Judges McCree and Celebrezze) disagreed over petitioner's contention of district court error in rejecting (T. 1204-05) UMW's proffered Instruction No. 5(c), which would have told the jury that Blue Diamond had to prove, *by a preponderance of the evidence,* that UMW agents or officers, within the scope of their authority, had participated in, ratified or encouraged the work stoppages in violation of the 1958 Agreement (T.

1175). *Though the jury charge contained no such guideline,* the trial court adopted Blue Diamond's contention that Kentucky law governed (T. 1191-1200), and thereunder, as held in *Mills* v. *Louisville & N. R. Co.,* 76 S.W. 29 (Ky.), "the Court should not instruct the jury upon burden of proof, but simply so frame the instruction as to indicate on whom the burden of proof lies". Concededly, the jury charge contained nothing more than the Kentucky rule, namely, "If breach of the contract has been established by the evidence . ." and "If you believe from the evidence" and like expressions (A. 24a).

Writing the Sixth Circuit's opinion, Senior Circuit Judge O'Sullivan conceded that where the burden of proof lies is a matter of substantive law, but declared "This, however, is not to say how a jury shall be instructed" (A. 25a) and noted that *"Neither the Supreme Court nor any of the Circuits have as yet fashioned a relevant controlling rule"* (A. 25a). In rejecting petitioner's argument, the jurist avowed that federal cases [*Central Vermont Ry.* v. *White,* 238 U.S. 507 (1915); *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957); *Jackson County* v. *United States,* 308 U.S. 343, 351, 352 (1939)] did not forbid the Sixth Circuit's "fashioning a rule to control the style of a relevant jury instruction, from employing the rule of the state in which a cause is tried" (A. 25a); that where a cause of action is created by Congress without time limitation, federal courts apply state limitation statutes; relied upon Rule 43(a), Federal Rules of Civil Procedure, to argue that regardless of the applicable federal statutory or court made rules, federal courts apply the comparable state evidentiary rule if more favorable to the reception of evidence (A. 26a); and pointed to *Mutual Life Insurance Co.* v. *Green,* DC, W.D. Ky., 1941, 37 F. Supp. 949, where-

in the contention that an instruction referring to the preponderance of evidence rule was essential in a federal jury trial under the Federal Constitution's Seventh Amendment was denied (A. 26a).

Concurring in the result, but disagreeing with Senior Circuit Judge O'Sullivan, Circuit Judges McCree and Celebrezze believed "federal district courts must uniformly instruct the jury to decide in accordance *with the preponderance of the evidence*" and "To hold otherwise might encourage state courts to attempt to vindicate important federal rights, created by the Congress, in disparate fashion by applying local law" (A. 29a). Though so disagreeing, Circuit Judges McCree and Celebrezze were "convinced that the court below did not prejudice appellant by using the Kentucky burden of proof instructions", because "The requirement that the jurors 'believe from the evidence' in effect requires that they be persuaded by the weight of the evidence" (A. 29a).

2.

To petitioner's contention of prejudicial error in the district court's rejection (T. 1204-05) of its proffered Instructions Nos. 1 and 4 (which would have told the jury it was not a contract violation for UMW members to cease working pending settlement of any grievance under the "Settlement of Disputes" section of the labor agreement or to refuse to work during the processing thereof) [T. 1173-74], the Sixth Circuit found such claim to be "without merit" (A. 28a).

3.

Petitioner contended the district court committed reversible error in rejecting petitioner's proffered Instructions Nos. 2 and 3, which would have instructed the jury

that UMW is not liable for its members' acts merely by virtue of membership or for spontaneous and wildcat stoppages, and that jury belief that work suspensions resulted from a spontaneous and wildcat stoppage would require a finding for petitioner (T. 1173-74, 1204-05). Though these instructions accorded with *Benedict* (259 F.2d 346) and *with the Sixth Circuit's holding herein* (*ante*, pp. 12, 19), *the charge contained no instruction by which the jury could have known UMW was not responsible for wildcat strikes*, and the jury was never instructed as to this vital defense, the Sixth Circuit believed UMW's non-responsibility for spontaneous or wildcat strikes was adequately covered by the district court's instruction that UMW "would not be liable for the action of the officers or individual members of the local union unless it is shown" UMW "authorized, participated in, or ratified the acts of the local union or individual members after express knowledge of such acts, which are claimed to be violations of the contract" (A. 22-23a).

4.

Summary treatment was accorded by the Sixth Circuit (A. 28a) to UMW's contention the trial court committed reversible error in charging the jury it was UMW's contractual duty to settle and resolve all disputes, troubles and grievances by the contractual procedures, rather than resort to strikes (T. 1188, 1190, 1204), and it was UMW's duty to take steps in good faith to utilize such reasonable and practical means "as were available to bring such strikes or conduct to an end, and to prevent a repetition of it" (T. 1193), ignoring UMW's contention that a provision in the 1950 Agreement that UMW exercise its "best efforts through available disciplinary measures to prevent stoppages of work by

strike" pending adjustment or adjudication of disputes had been deleted from the 1958 Agreement (T. 1204, 1207).

5.

The Sixth Circuit gave similar summary treatment (A. 28a) to UMW's contention the district court erred in submitting for jury determination whether the various work stoppages violated the 1958 Agreement and in permitting the jury to consider such work stoppages as a breach thereof (T. 1190, 1203), and whether UMW authorized, participated in or ratified any of the alleged work stoppages, it being UMW's position that there was no evidence to show it had authorized, instigated or ratified any of the stoppages.

6.

To UMW's exceptions and contentions (T. 1206-07) that a breach of contract action warranted recovery of damages only as might reasonably have been within the parties' contemplation when the contract was made, and that remote, uncertain or speculative damages could not be recovered (as UMW's proffered Instruction 8 would have told the jury), the Sixth Circuit held "the jury was correctly instructed on the matter of damages" (A. 22a). *Notably, the jury was never told that remote, uncertain or speculative damages were not recoverable despite the Sixth Circuit's opinion's recitation that Blue Diamond proffered an instruction to that effect* (A. 22a).

D. The Sixth Circuit Approves the Jury's Findings on Liability and Damages.

In both the district court and the Sixth Circuit, UMW contended the strike activity was not violative of the 1958 Agreement and did not subject it to a damage action

under the Act's Section 301; that undisputed evidence required a finding that in each of the work stoppages determination not to work was that of employees of their own volition and without UMW authorization or sanction; that in each instance employees returned to work because of efforts of UMW or District officers and personnel; and that under the Act's Section 301(e) the stoppages were not imputable to UMW; and that, in any event, under *Benedict's* declaration (259 F.2d 350) that "The right to strike was preserved with respect to all disputes not subject to settlement by other methods made exclusive by the agreement", the roving picket situation in December, 1962 and January, 1963, in each of which No. 1 employees refused to cross the picket line, were not disputes for settlement under the grievance machinery procedures. Though exculpating UMW from responsibility for the stoppage on May 22 and 23, 1962, the one-half day stoppage on August 24 and the one day stoppage on October 1, both 1962, the Sixth Circuit, as to the remaining 24 days, was "satisfied that there was evidence from which the jury could affix responsibility upon UMW, citing *Lavender* v. *Kurn*, 327 U.S. 645 (1946) [A. 16a].

The Sixth Circuit also held that Blue Diamond's testimony "was sufficient to allow" the jury to determine the correctness of computing methods employed and, except as to the several work stoppages which it declared "cannot be charged to the UMW, the jury's verdict was not excessive" (A. 21a). Disallowing recovery of $34,095.79 for the three and one-half days for which the Sixth Circuit did not allow recovery, it affirmed Blue Diamond's judgment for $247,894.78 (A. 28a).

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT HAS DECIDED A FEDERAL QUESTION, IMPORTANT IN PROCESSING COLLECTIVE BARGAINING AGREEMENTS, IN RELATION TO LABOR'S RIGHT TO STRIKE, IN CONFLICT WITH NATIONAL LABOR POLICY AS EXPRESSED BY CONGRESS, AND WITH PRIOR DECISIONS OF THIS AND OTHER FEDERAL COURTS AND THE NATIONAL LABOR RELATIONS BOARD.

National labor policy expressed in the Act's Section 7 accorded employees the right to bargain collectively through representatives of their own choosing, and its Section 13 commands that:

> *"Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike."*

The Sixth Circuit's adherence to *Lewis* v. *Benedict Coal Company*, 259 F.2d 346 (1958), and to the dissenting opinion in *International Union, UMWA* v. *NLRB*, D.C. Cir., 257 F.2d 211 (1958), conflicts not only with the foregoing congressional mandate but also with interpretative standards dealing with labor's right to strike fixed by this Court in *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 293 (1957), with an applicable majority decision in *International Union, UMWA* v. *NLRB, supra,* and is in probable conflict with the Sixth Circuit's own approval of the district court's results in *Garmeada Coal Co.* v. *International Union, UMWA*, DC, E.D. Ky., 1954, 122 F. Supp. 512, aff'd. 6 Cir., 230 F.2d 945 (1956).

There has long been judicial sanction of employees' right to withhold their services and engage in work stoppages or strikes, giving labor the necessary equality in the collective bargaining process (*American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184). Employees could "sell . . their labor . . upon such terms and conditions as they" chose. *Hunt* v. *Crumboch*, 325

U. S. 821, 824. Though Taft-Hartley's collective bargaining scheme seeks to reduce strikes and industrial unrest, its legislative history supports the position that the right to strike was preserved[14] and whether a labor union and its members waived or limited that right and what sanctions, if any, were to be imposed for the breach of any obligations agreed upon, remain appropriate subjects for free collective bargaining.[15] The Sixth Circuit's holding herein is inconsonant with this Court's declaration in *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 293 (1957) that:

> "Where there has been no express waiver of the right to strike, a waiver of the right during such period is not to be inferred."

Faced with damage actions sanctioned by Section 301, UMW was no longer willing that the "no strike" and kindred clauses remain in its Agreement.[16] Hence, as a result of collective bargaining, contracting coal operators and UMW, signatories to the 1950 Agreement, *by affirmative recitals*, made it positive that a strike or work stoppage was no longer a breach of the collective bargaining agreement by expressly providing that the "no strike" and related clauses in the 1941 and 1945 Agreements were rescinded, cancelled, abrogated and made null and void (*ante*, p. 8) and that

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[14] *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665, 673, fn. 8, quotes Senator Taft (93 Cong. Rec. 3835):

> "So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining."

[15] In considering the question of enforcement of collective bargaining contracts against labor organizations, argument was advanced that such responsibility would result in labor's refusal to consent to inclusion of no strike clauses in contracts, but such an argument was rejected by the Senate Committee by declaring that inclusion of "no strike" clauses in agreements "is certainly a point to be bargained over." Senate Report No. 105, 80th Cong., 1st Session, pp. 17-18.

[16] Actually, cancellation of the "no strike" and kindred clauses occurred in the 1947 Agreement, and in *International Union, UMWA* v. *NLRB*, D.C. Cir., 257 F.2d 211, 216, it was said, this "was done to remove the danger that the union might be sued for breach of contract under the new statute."

> "any provisions in District or Local Agreements providing for the levying, assessing or collecting of fines or providing for 'no strike,' 'indemnity' or 'guarantee' clauses or provisions are hereby expressly repealed and shall not be applicable during the term of this Agreement" (A. 43a).

These express covenants thus specifically freed coal miners of the 1941 and 1945 commitment that "Pending the hearing of disputes the Mine Workers shall not cease work because of any dispute" (ante, pp. 6-7).

The Sixth Circuit's acceptance herein of *Benedict* necessarily includes the latter's concession that the "no strike" provisions in contracts antedating the 1950 Agreement "were superseded" and that the "right to strike" was expressly preserved in the 1950-52 agreement (259 F.2d 351). Yet, totally inconsonant therewith is the Sixth Circuit's antithetical conclusion that elimination of the "no strike" clauses "did not render unenforceable" the "obligation to settle *all* disputes through the current contracts" (A. 6a).

Adhering to *Benedict,* the Sixth Circuit noted "the standard UMW contract had, in 1952, been revised to eliminate the word 'exclusive' and some other provisions" (A. 6a). Comparison of the two Agreements shows *the 1950 Agreement expressly provided* that "any and all disputes, *stoppages,* suspensions of work . . shall be by the contracting parties settled and determined *exclusively*" by the Agreement's machinery for settlement of disputes (*ante,* p. 8), but the 1952 and 1958 Agreements, *omitting* the words *"stoppages" and "exclusively",* provided merely that "all disputes and claims which are not settled by agreement shall be settled by" the grievance machinery (*ante,* p. 9).

In sanctioning *Benedict*, the Sixth Circuit followed the former's thesis that the 1950 Agreement made disputes subject to the grievance procedures because of the word "exclusively" found in the Agreement's Paragraph 3 of "Miscellaneous" section; but this reasoning *ignored the further contract fact that "stoppages"*, as well as disputes, were to be settled in similar manner, *thus manifesting contracting parties' obvious recognition that stoppages would occur.* Such recognition, coupled with abrogation of the "no strike" provisions of earlier contracts, including the covenant that pending the hearing of disputes there would be no stoppages, is positive proof that stoppages pending settlement of disputes were not prohibited, and were likely to occur, in which event they were not violative of the 1950 Agreement. As in *Benedict*, the Sixth Circuit fails to recognize it is one thing to agree to process "stoppages" under the settlement procedures but an entirely different matter to say there is agreement not to resort to a stoppage pending settlement. A strike, juridically defined as a lawful economic instrument,[17] does not of itself resolve disputes[18] but settlement thereof is only through collective bargaining. *The fact that earlier agreements specifically prohibited stoppages pending settlement shows that when their signatories intended such result they knew how to effectuate it in clear and positive language.* Its absence from the 1952-58 Agreements is a positivism that the result reached by the Sixth Circuit was not the intent of the Agreement's signatories.

The Sixth Circuit's conclusion is even more patently

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[17] *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209.

[18] Accord: *W. L. Mead, Inc.* v. *Int. Bro. of Teamsters*, DC, Mass., 1954, 126 F. Supp. 466, 467, aff'd. 230 F.2d 576 wherein it is said: ". . a strike never 'adjudicates' anything".

offensive in its applicability to the 1958 Agreement. As previously shown, the 1952 Agreement [which was carried forward into the 1958 Agreement (*ante*, pp. 9-10) did not require that *stoppages* be settled under the grievance machinery, *nor indeed that stoppages or disputes be settled exclusively thereunder*. By the 1952 and 1958 Agreements the parties agreed that (1) stoppages were not to be settled under the grievance machinery and (2) the grievance machinery no longer constituted the exclusive method for settlement of disputes. If the contracting parties intended that there should be no work stoppages pending settlement of disputes, why would they have studiously deleted the earlier contracts' requirement that "pending the hearing of disputes, the Mine Workers shall not cease work" and why would they, with assiduity, have provided for rescission of the no-strike and like clauses? It is indeed illogical and unsound to argue that the parties would have thus so unequivocally manifested the miners' right to strike, even during the pendency of the dispute settlement, and then in the same instrument to have intended, by implication, to proscribe strike action; but such is the Sixth Circuit's result herein and in *Benedict*. It attributes to signatories the doing of a meaningless thing. Clearly, an employee reading that no-strike and related clauses had been deleted could conclude only that his right to strike had been restored totally and unequivocally (see *post*, p. 35).

The Sixth Circuit's conclusion results in an emasculation of the parties' agreement, contrary to this Court's professions that plain provisions of a valid contract may not be ignored. *Colgate-Palmolive Peet Co.* v. *NLRB*, 338 U.S. 355, 363. It finds challenge, too, in the principle that denies implied terms which "are inconsistent with express provisions". 17 Am. Jur. 2d, *Contracts*, Sec-

tion 255, p. 652; *Hawkins* v. *United States*, 96 U.S. 689 (1877). Aptly stated are Mr. Justice Cardozo's words in *Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 169 N.E. 386, 391, 393:

> "Courts are not at liberty to shirk the process of construction under the empire of a belief that arbitration is beneficent . . . No one is under a duty to resort to these conventional tribunals . . except to the extent he has signified his willingness . . . [*Contracting parties*] . . . *are not to be trapped by a strained and unnatural construction of words of doubtful import into an abandonment of legal remedies, unwilled and unforeseen.*"

To adopt the Sixth Circuit's distortion of the contracting parties' agreement is not conducive to the elimination of strike activity, but is invitatory to labor unions to withdraw from collective bargaining agreements' provisions for settlement of disputes through grievance procedures.

UMW's position is in no wise affected by the Agreement's integrity clause (*ante*, p. 9). A contract "must be read as a whole" (*Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 279) and so interpreted as to give meaning to all its provisions and to avoid rendering portions of it contradictory and inoperative. *Merrill-Ruckgaler Co.* v. *U. S.*, 241 U.S. 387; *Williston on Contracts* (Rev. Ed.), Vol. 3, p. 1781. The "integrity" provisions may not be read in isolation from those which clearly show the contracting parties' intention that the right to strike was preserved. Any contrary construction would render such clauses wholly nugatory, incongruous and meaningless.

Clearly, UMW's obligation to maintain the contract's integrity could not encompass a guarantee that Blue Diamond's employees would not engage in a work stoppage during pendency of the settlement of disputes,

when, by the deletion of the "no strike", "penalty" and "Illegal Suspension of Work" clauses, the right to strike became a permissive activity. Nor did UMW by the "integrity" clause give assurances it could or would force employee members to work against their will. Pertinent is *American-Hawaiian S.S. Co.* v. *Sailors Union of the Pacific*, DC, N.D. Calif., 1941, 37 F.Supp. 828, wherein despite a "no strike" clause and a contractual obligation "to furnish capable, competent and satisfactory employees", the district court absolved the union of liability resultant upon a strike because (37 F.Supp. 828-29): "Respondent cannot compel men to work; it can only . . try to persuade them to take such work. If Respondent does this . . it complies with its contract obligations."

The District of Columbia Circuit,[19] interpreting the 1952 Agreement's language, in *Int. Union* v. *NLRB* (257 F.2d 211), refused to read the "integrity" clause as restoring the "no strike" clause which had been expressly rescinded by the parties, saying (p. 217): "what was eliminated unequivocally in subsection 3 was a 'no strike' agreement" and that "if we are to credit the parties with normal capacity to reason and express themselves we cannot read subsection 3 as a 'no strike' agreement." Since the 1958 Agreement contained the identical provisions thus construed by the District Circuit, its relevance to the 1958 Agreement is obvious.

The Sixth Circuit noted its inconsonancy with that of the District Circuit but cast its preference with the dissenting views of then-Circuit Judge Burger, the Fourth Circuit's *United Construction Workers* v. *Haislip Baking Co.*, 4 Cir., 223 F.2d 872, and the First Circuit's *W. L.*

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[19]Sometimes herein called the "District Circuit".

Mead, Inc. v. *Int. Brotherhood of Teamsters*, DC, Mass., 1954, 126 F.Supp. 466, affd. 1 Cir., 230 F.2d 576.

In casting its agreement "with the dissenting judge in" the District of Columbia case, the Sixth Circuit necessarily approved the dissent's reasoning (257 F.2d 218) that the strike constituted "pressure tactics" which were "in violation of *express* contract provisions" (p. 220)—reasoning which is dissonant with the bargaining history of the 1950-58 contracts and other specific language thereof, and reflects also the dissenting jurist's failure to accede to the Congressionally-declared policy in the Act's Sections 13 and 502 and that the right to strike shall be a subject for collective bargaining, that the Act's legislative history supports the view that the right to strike was preserved and so recognized in *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665, 673, fn. 8 (*ante*, p. 26, fn. 14). Moreover, the dissent's reasoning that ". . the presence or absence of a 'no strike' clause is beside the point" (257 F.2d 219) renders its validity questionable.

Disagreeing with the Sixth Circuit herein, the District Circuit appraised the *Haislip* and *Mead* cases (*ante*, pp. 31-32) as "no justification for, by the process of benevolent interpretation, making a contract for the parties which, to a moral certainty, they did not make for themselves" (257 F.2d 217-18). Such reasoning, petitioner submits, is likewise apposite to the Sixth Circuit's conclusion herein. Neither *Mead* nor *Haislip* contained positive covenants, as does the 1950 and 1958 Agreements, that prior no-strike clauses are rescinded and made null and void; they contained only grievance and arbitration procedure provisions; and it is noteworthy that in *Mead* the district court's opinion declares that:

> "An arbitration clause is not the same thing as a 'no strike' clause, and cannot . . . have such broad consequences" (126 F. Supp. 467),

and that there was no testimony "that the Union specifically wanted to protect its right to strike" (126 F. Supp. 469).

Previous to its holding in *Benedict* and the instant case, the Sixth Circuit concerned itself, in *Garmeada Coal Co.* v. *International Union, UMWA*, 6 Cir., 230 F.2d 945, in a damage action against UMW, a local union and a district, with the right to strike under the same 1950 Agreement involved in the instant case; and it sanctioned the district court's reasoning that therein the miners were *"pursuing their right to strike regardless of the provisions of the"* Agreement (DC, E.D. Ky., 1954, 122 F. Supp. 512, 518). When it is considered the trial court in *Garmeada* incorporated in its decision the "Settlement of Local and District Disputes" section of the 1950 Agreement, the conflict between *Benedict* and the Sixth Circuit's conclusion herein and its approval of the district court's reasoning in *Garmeada* is readily apparent.

Neither *United Steel Workers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), nor *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95 (1962), supports the Sixth Circuit's result. Unlike the instant contract, which expressly eliminated previous no strike clauses, *Warrior* had both a no strike clause and an arbitration clause, and *Warrior's* primary issue concerned an interpretation of the arbitration clause. *Lucas Flour* specifically declared (369 U.S. 106) that, "What has been said is not to suggest that a no-strike agreement is to be implied beyond the area which it has been agreed will be *exclusively* covered by compulsory terminal arbitration". Likewise,

the Sixth Circuit ignores *Lucas Flour's* invitation (p. 106, fn. 15) to compare the District of Columbia's *UMW* case with that of *Benedict,* which petitioner asserts is relevant because of the change in language in the 1952 and 1958 Agreements.[20]

Despite its contrary view argued in *International Union, UMWA* v. *NLRB, supra,* which was rejected by the District of Columbia Circuit, NLRB's holdings prior thereto had constantly been that renunciation of the right to strike "will not be found to exist *except when expressed in clear and unequivocal language*". *Textron Puerto Rico,* 107 NLRB 583, 587; *Consolidated Frame Co.,* 91 NLRB 1295, 1297; *California Portland Cement Co.,* 101 NLRB 1436, 1439; *Mastro Plastics Corp.,* 103 NLRB 511, 557.

The foregoing discussion demonstrates the conflict of the Sixth Circuit's conclusion with decisions of this Court, the District Circuit and the National Labor Relations Board, in addition to its being erroneous.

Congress having made it clear that the right to strike was a matter for collective bargaining and had been preserved as a matter of federal policy, except as Congress had curtailed it in the Act or as labor contractually waived such right, a judicial opinion, such as the instant one, which has been translated into a large money judgment for damages, negating such right, should appropriately be reviewed. This is particularly true where, as here, the agreement is one covering so important an industry as the bituminous coal industry and covering conditions of employment of thousands of coal miners.

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[20]See footnote 7 herein (*ante,* p. 10).

II. BENEDICT'S PARTIAL PRESERVATION OF THE RIGHT TO STRIKE WAS ERRONEOUS BUT, IN CONFLICT THEREWITH, THE SIXTH CIRCUIT HEREIN HAS ELIMINATED IT.

Benedict sought to justify its holding by contending its conclusion "does not make meaningless the express abrogation of a no strike clause in the 1950-52 agreement", and that the *"right to strike was preserved with respect to all disputes not subject to settlement by other methods made exclusive by the Agreement"* (259 F.2d 350). But, when the contracting parties in the 1950-52 and 1958 Agreements rescinded and made inapplicable and null and void the no-strike clauses of earlier contracts, they preserved the right to strike totally and unequivocally. They did not agree that the right to strike was preserved *only* "with respect to all disputes not subject to settlement by other methods made exclusive by the agreement." The declaration of the partial preservation of the right to strike was the result of the Sixth Circuit's reformation of the contract in *Benedict;* it was in total conflict with the understanding and intent of signatories to the Agreement, expressed in unequivocal language.

While the Sixth Circuit herein, avowing adherence to *Benedict,* declared, "Nothing herein is intended to hold that the bargaining contract should be read as imposing liability upon UMW for spontaneous or wildcat strikes in which it had no part by way of causing or prolonging such strikes" (A. 9a), the Sixth Circuit makes no reference to *Benedict's* avowal that the "right to strike was preserved with respect to all disputes not subject to settlement by other methods made exclusive by the agreement", obviously having eliminated it from its acquiescence with *Benedict.*

The Sixth Circuit's sanction of the money judgment herein without response to UMW argument that the December, 1962 and January, 1963 stoppages were not within *Benedict's* definition emphasizes the Sixth Circuit's deviation therefrom and error in the instant case and invites this Court's award of the Writ sought herein.

III. THE SIXTH CIRCUIT HAS ERRONEOUSLY APPROVED A JURY VERDICT IN WHICH THE JURY WAS DEPRIVED OF AN APPROPRIATE JUDICIAL GUIDE BY WHICH TO MAKE ITS DETERMINATIONS OF LIABILITY AND DAMAGES.

Petitioner contends now, as it did in both lower courts, that failure to give Instruction No. 5(c) concerning the preponderance of evidence rule (*ante*, p. 19), as proffered by UMW, deprived the jury of any guideline as to the degree of proof required of Blue Diamond to warrant a jury verdict in its favor. The purpose of instructions is to give proper guidance to the jury in their deliberations, so they may reach a correct verdict (Cyclopedia of Federal Procedure, 3d Ed., Vol. 9, p. 373). Similarly, 53 Am. Jur., *Trials*, Sec. 743, p. 554, recites:

> *"It is a well-settled and firmly intrenched doctrine that the issues of fact in civil cases must be determined in accordance with the preponderance or weight of evidence, and the jury should be instructed on all proper occasions that their decision should be made according to the preponderance of the evidence . ."*

Since the instant action is one based on a federal statute expressive of national labor policy, appropriately it is federal law, not state law, which governs the action's substantive problems. Indeed, *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456-57, concludes "that the substantive law to apply in suits under §301(a) is *federal law* which the courts must fashion from the policy of our

national labor law", that problems arising thereunder "will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy"; and that "Federal interpretation of the federal law will govern, not state law". *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 102, calls for uniformity in the law, and this may be achieved only by applying *federal,* as distinguished from state, law.

Absent the court's advising the jury on the necessity and meaning of *"preponderance of the evidence"*, the Sixth Circuit, like the district court, deprived the jury of a juridical guide by which to make its determination and accounts for the jury's verdict to be premised upon conjecture.

Heretofore, federal district courts in the Sixth Circuit have employed preponderance-of-the-evidence as the appropriate standard of proof. The record[21] in *Benedict* (259 F.2d 346) which, like the instant case, involved an alleged breach of the National Bituminous Coal Wage Agreement, discloses a district court instruction requiring the plaintiff company therein to establish the alleged contractual violations therein by a *preponderance of the evidence,* recites: "Where the burden of proof rests upon a particular party, he is required to prove his claim by a preponderance of the evidence. Preponderance means, merely, the greater weight of the evidence"; and other portions of the jury charge in *Benedict* required proof by "a preponderance of the evidence" (pp. 732-33, 735). In *Gibbs* v. *UMW*, 6 Cir., 343 F.2d 609, the record discloses that UMW's liability was submitted to the jury under an instruction requiring *preponderance of the evi-*

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[21]The Joint Appendix, Vol. II (No. 13,056 in the Sixth Circuit and No. 19 in this Court).

dence.[22] In *Garmeada* (*ante,* p. 33), the district court declared plaintiff had failed to sustain its burden of showing a contractual violation "by a *preponderance of evidence*" (122 F.Supp. 518). In *Erwin* v. *Keck,* 6 Cir., 351 F.2d 403, 407, the Sixth Circuit stated "*We note that the trial judge did not instruct the jury on burden of proof.* This was prejudicial to the defendant rather than to the plaintiff."

While, as elsewhere discussed (*ante,* p. 21), two members of the Sixth Circuit's panel agree with UMW's contention that "federal district courts must uniformly instruct the jury to decide in accordance with the preponderance of the evidence" consistent with *Lucas Flour's* demand for uniformity (*ante,* p. 21) because "To hold otherwise might encourage state courts to attempt to vindicate important federal rights, created by Congress, in disparate fashion by applying local law" (A. 29a), nonetheless their argument that petitioner was not prejudiced by the trial court's "using the Kentucky burden of proof jury instructions" on the ground that the "requirement that jurors 'believe from the evidence' in effect requires that they be persuaded by the weight of the evidence" (A. 29a) is no more than judicial evasion of their sanction of their preponderance-of-the-evidence rule since the jury charge was wholly silent of the requirement that the jury be "persuaded by the weight of the evidence". The absence of such language results in the jury being guided by nothing more than the Kentucky rule which, as recited by Senior Circuit Judge O'Sullivan, is "If breach of the contract has been established by the evidence . ." and "If you believe from the evidence" and like expressions (A. 24a).

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[22]Case No. 15,624 in the Sixth Circuit, p. 499a, and No. 243 in this Court.

The abortive attempt of the jurists to substitute "weight of the evidence" for the preponderance-of-evidence rule proffered by UMW's instruction leaves the instruction in the same posture in which the district court left it—namely, without judicial guide for the jury.

Since, as Senior Circuit Judge O'Sullivan stated, this Court has not "as yet fashioned a relevant controlling rule" (A. 25a), repetitive use of the Act's Section 301 as a supporting device for litigation by management and labor alike impressively invites this Court to award the Writ herein.

IV. THE SIXTH CIRCUIT'S SANCTION OF THE DISTRICT COURT'S REJECTION OF UMW'S PROFFERED INSTRUCTIONS CONCERNING UMW'S NON-RESPONSIBILITY FOR SPONTANEOUS AND WILDCAT WORK STOPPAGES IGNORES ITS ADHERENCE HEREIN TO BENEDICT, CONFLICTS WITH PRIOR DECISIONS OF THE SIXTH AND FOURTH CIRCUITS, AND IS ERRONEOUS UNDER DECISIONS OF THE FIFTH AND SEVENTH CIRCUITS.

The Sixth Circuit's sanction (*ante*, p. 21-22) of the district court's rejection of UMW's proffered Instructions 2 and 3, which would have told the jury that UMW is not liable for its members' acts merely by virtue of membership, or for spontaneous and wildcat strikes is clearly erroneous. The Sixth Circuit herein, in *Benedict* (259 F.2d 346) and in *Garmeada* (230 F.2d 945) and the Fourth Circuit in *Haislip* (223 F.2d 872) have approved the rule expressed in the proffered instructions.

Since the jury charge no where contained UMW's theory of defense, as propounded in the proffered instructions, and there was evidence supporting UMW's theory, the Sixth Circuit's approval of the district court's rejection conflicts with the Fifth Circuit's *Paramount Film Distributing Corp.* v. *Applebaum*, 5 Cir., 217 F.2d 101,

123, holding that "specific instructions on the theory of defense which cover or relate to the various elements of that theory for which there is record evidentiary support" are required. The Seventh Circuit's *Florists' Nationwide Tel. Del. Net.* v. *Florists' Tel. Del. Assn.*, 7 Cir., 371 F.2d 263, 270 (1967) is in accord.[23]

V. THE SIXTH CIRCUIT HAS APPROVED AN AWARD OF DAMAGES BASED UPON A JURY'S CHARGE WHICH FAILED TO INCLUDE ANY STANDARD TO GUIDE THE JURY. IT ERRED IN REJECTING A PROFFERED INSTRUCTION THAT DAMAGES BASED UPON SPECULATION COULD NOT BE RECOVERED.

The Sixth Circuit has approved a jury charge that if it believed UMW had breached its contract, then its award should be for "such damages, if any, as you shall believe from the evidence were suffered by plaintiff as a direct result of" UMW's contractual breach (T. 1191), "but not exceeding $281,990.57, the amount claimed" (T. 1194). UMW's exceptions (T. 1207) were overruled (T. 1207).

No other guide for the award of damages was given the jury. Under UMW's proffered Instruction No. 8, the jury would have been told that remote, uncertain or speculative damages could not be recovered. The jury was not told that damages could not be determined by speculation or guess.

Furthermore, it is well settled that in an action for breach of contract, the damages to be recovered are such, and only such, as may reasonably be supposed to have been within the contemplation of the parties when the contract was made. 22 Am. Jur. 2d, *Damages*, §56,

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[23]Other rulings concerning the jury charge by the Sixth Circuit and the district court, discussed under Section C. of Statement of the Case and numbered therein as 1, 3 and 4 (*ante*, pp. 19-23), are answered under Point I of Reasons for Granting the Writ (*ante*, pp. 25 et seq.).

p. 88. The district court rejected UMW's exception to the jury charge which asserted that "the evidence shows that such stoppages under a fair construction of the contract was not within the scope of the contemplation of the wage agreements" in effect at the time of the stoppages (T. 1207). Certainly, it could not have been within the parties' contemplation that Blue Diamond suffer damage by reason of its No. 1 mine employees refusing to cross an unauthorized picket line by either roving pickets (*ante*, p. 15) or by employees at the No. 2 mine (*ante*, p. 18). The court's failure to include this element in its charge concerning damages was in direct conflict with the rule as above enunciated.

VI. THE SIXTH CIRCUIT'S APPROVAL OF THE JURY'S VERDICT ON THE PREMISE IT WAS SUPPORTED BY EVIDENCE COLLIDES WITH AND IGNORES GUIDELINES OF PRIOR IMPORTANT DECISIONS OF THIS COURT AND OF THE FOURTH AND TENTH CIRCUITS, IS IN CONFLICT WITH ITS OWN DECISIONS, AND IS ERRONEOUS.

In addition to contending error in the Sixth Circuit's holding that strike activity was a prohibited activity under the 1958 Agreement (discussed, *ante*, p. 25 et seq.), UMW complained also of the Sixth Circuit's approving the jury verdict of UMW responsibility for the several work stoppages (A. 9-19a).

In agreeing the verdict had evidentiary support, the Sixth Circuit employed this Court's *Lavender* v. *Kurn*, 327 U.S. 645 (1946) and its own *Lones* v. *Detroit, Toledo & Ironton R.R.*, 6 Cir., 398 F.2d 914 and *Smith* v. *Illinois Central R.R.*, 6 Cir., 394 F.2d 254, both 1968. Though *Lavender* held (p. 653) "where there is an evidentiary basis for the jury's verdict the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion", it also declared "*when there is a complete*

absence of probative facts to support the conclusion reached" by the jury, reversible error exists (A. 16-17a). While *Smith* required the Sixth Circuit to "consider the evidence in the light most favorable" to the verdict, it demanded it be supported by *substantial evidence* and that inferences drawn from the facts be *reasonable inferences"*. The Sixth Circuit-sanctioned verdict herein is woefully deficient in meeting the juridical demands of "substantial evidence", "reasonable inferences" and "probative facts" to support the verdict.

Since the Sixth Circuit, agreeable to *Benedict* (259 F.2d 352), *Garmeada* (122 F.Supp. 512, affd. 230 F.2d 945) and *Haislip* (223 F.2d 872), freed UMW from liability for spontaneous or wildcat strikes (A. 9a), and there is no showing UMW instigated any of the stoppages, Blue Diamond's burden was to prove not only the existence of an agency relationship to UMW but also the nature and extent of the agent's authority.

In providing for breach of contract action, the Act's Section 301(e) provides that:

> "For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling".

UMW Members and the Local Union Were Not UMW Agents

Since this Court's recognition, more than 40 years ago, of a union's suability as an "artificial person",[24] the fed-

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[24] *UMW* v. *Coronado Coal Co.*, 259 U.S. 334, 388, 391; *Coronado Coal Co.* v. *UMW*, 268 U.S. 295, 304-05.

eral judiciary has regarded unions as entities *distinct from union membership.*[25]

The Act's legislative history points to congressional intent to adopt the common law rules of agency. *UMW* v. *Patton,* 4 Cir., 211 F.2d 742; *Haislip,* 223 F.2d 872. Under *Coronado,* mere affiliable relationship between a local union and UMW did not suffice to establish an agency relationship. Prior Sixth Circuit agreement therewith appears in its affirmance of *Garmeada,* 122 F. Supp. 512, aff'd. 230 F.2d 945.

The Mine Committee Was Not a UMW Agent

In providing the several steps constituting the grievance machinery, no obligations were imposed upon or assumed by UMW. Instead, grievances were to be processed by the Mine Committee, a creature of the Agreement (*ante,* p. 13),[26] which designated the membership number and delineated that membership selection should be by Blue Diamond's employees. In the performance of its authorized duties, the Mine Committee represented the members who elected them and were the Committee's principals. *Hence, the Committee's failure to initiate the grievance procedure is not imputable to UMW.*

No Evidence Connects UMW With the Work Stoppages

Similarly, contractual provisions in respect to grievance procedures did not create joint obligations so as to impose upon UMW an obligation in connection therewith. *Boeing Airplane Co.* v. *Aeronautical, etc. Assn.,* DC, Wash. (1950), 91 F.Supp. 596, aff'd. 9 Cir., 188 F.2d 256, cert. den. 342 U.S. 821. Moreover, there is a total ab-

[25]*U. S.* v. *White,* 322 U.S. 694, 702.

[26]The several steps under the Agreement's "Settlement of Local and District Disputes" section appear at A. 43-44a.

sence of evidence that UMW authorized either Local 8280 or the Mine Committee to adopt, on its behalf, the wildcat strikes. To the contrary, the undisputed evidence is that UMW policy was opposed to unauthorized strikes and in each of the strikes which occurred on May 29-June 4, 1962, December, 1962 and January, 1963, the stoppages ceased and employees returned to work *only after UMW or District President Beane, and Perkins and Feltner insisted they do so.*

The May 29-June 4, 1962 Stoppage

As shown (*ante,* pp. 14-15), no evidence attributes to any UMW agent conduct which imputes to UMW responsibility for the May 29-June 4, 1962 stoppage. Uncontradicted evidence is UMW had nothing to do with the stoppage (T. 1001).

Apprised of the May 29-31 and June 1-4 stoppage, UMW immediately disavowed UMW's or District's responsibility therefor, and urged District President Beane "to take personal charge . . and do everything to return the mine to operation and handle the grievances under the contract" (T. 660-67). No. 1 mine employees rejected efforts of Beane, Perkins and Feltner by voting against returning to work, which caused UMW to wire Local Union President Coach instructing Local Union officers and members "to forthwith return to work" and resolve grievances under the contract; and the men finally voted to do so (T. 670, 774). As shown (*ante,* p. 15), there is employee testimony concerning UMW efforts: "If we don't obey their orders, I don't lay the blame on the International" (T. 1001) because "It was the employees there at No. 1" (T. 1002).

The May 29 stoppage stemmed from employee's being incensed over Blue Diamond's having violated its previ-

ously-made agreements (*ante,* p. 14). No witness attributes the stoppage to alleged statements of Perkins.

Garmeada rejected UMW liability where union representatives induced men to discontinue the strike but only after sufficient time elapsed for cooling heated tempers (122 F. Supp. 518) and the Sixth Circuit agreed (230 F.2d 945). Since the Sixth Circuit relates Perkins' statement to the discharge case, significantly it was arbitrated. Pertinently, *Haislip* records that "arbitration would not stop the 'wildcat' strike" and that the strike's continuation would not make UMW liable "unless under their contract they are liable for strikes which have not authorized and do not sanction; and we cannot find any such liability in the contract" (223 F.2d 877). *Haislip* stands to challenge the Sixth Circuit herein. Moreover, since the stoppage was spontaneous, *Benedict* and other federal authorities (*ante,* pp. 25-34) profess UMW's nonliability.

The December, 1962 and January, 1963 Stoppages

Persistent efforts of Beane, Perkins and Feltner brought cessation to the December, 1962 stoppage occasioned by roving pickets (*ante,* pp. 15-17). There is employee agreement that neither UMW nor District representatives directed employee participation in the stoppage (T. 958).

When, in January, 1963, a stoppage occurred because employees from Blue Diamond No. 2 mine picketed its No. 1 employees who refused to cross a picket line, it required the efforts of not only Beane, Perkins and Feltner who urged them to "get back to work", but also those of UMW's International Board members Hibbitts and Titler, all of whom were unsuccessful in effectuating a return to work by the employees. It was not until em-

ployees of the two mines, in joint meeting, met with Beane, Perkins, Feltner and a District field representative named Castle, that the No. 2 group agreed to withdraw its pickets at No. 1 and subsequently the No. 1 employees returned to work (*ante*, pp. 17-18).

While the Sixth Circuit credited Blue Diamond witnesses who attributed to Perkins the statement, with reference to strikes, that he would tell them they would tell them they would have to go back to work but they could read between the lines (*ante*, p. 18), which meant that "We didn't go back to work" or "you men know what to do" (T. 231), none of the witnesses pinpointed the time such statement allegedly was made; and, since a single Blue Diamond witness testified it was in December, *1963* (*ante*, p. 18), necessarily this could not have related to any of the work stoppages involved in this action. But even if a witness' statement that "It might have concerned No. 2 or something or other" (T. 232) could be interpreted as relating to the January, 1963 strike, *the undisputed evidence is that that work stoppage ceased through the efforts of UMW's Hibbitts and Titler, and Beane, Perkins and Feltner* (*ante*, p. 18).

Indeed, the Fourth Circuit's *Haislip* (223 F.2d 872) holds that field representatives of a parent union would not have implied authority to adopt, on the parent union's behalf, a wildcat strike conducted by a local union, and the parent union is not liable for damages to an employer in a breach of contract action under the Act's Section 301.

Further, *UMW* v. *Gibbs*, 383 U.S. 715, avows "it would be inconsistent with the fabric of national labor policy to infer ratification from the mere fact that" UMW "involved itself in the dispute" after the stoppage occurred

and such policy "requires that national unions be encouraged to exercise a restraining influence on explosive strike situations; and when they seek to do so, they should not for these activities be made to risk liability" (383 U.S. 738-39). In the instant situation, UMW was responsive to Blue Diamond's notice of the work stoppage, and it proceeded to effect a return of the men to work.

The Sixth Circuit's statement that "An intelligent jury could listen *cum grano salis* to the UMW protestations of its impotence to control the miners who were subject to its authority" (A. 18a) ignores unchallenged testimony and lacks any supporting proof; it collides with the rule that a union cannot compel men to work but can only try to persuade them to do so (*ante*, p. 31) and with *Benedict's* holding that "Unions remained free from liability for spontaneous 'wildcat' strikes"; it conflicts with this Court's *Gibbs* (*ante*, p. 46) and with *U. S.* v. *Int. Union, UMWA*, DC, D.C., 1950, 89 F. Supp. 179.

The evidence of UMW's efforts to have the No. 1 employees cease the several work stoppages stands *uncontradicted.* The Sixth Circuit's approval of the verdict that UMW was responsible for the several stoppages necessarily was based upon speculation and guesswork. Appropriately the Sixth Circuit should have applied the rule of *Browning* v. *Crouse*, 10 Cir., 356 F. 2d 178, that:

> "Unimpeached, positive testimony may not be disregarded, even though adduced from interested witnesses, *and no question of credibility or issue of fact is presented for determination by a trier of fact*"

and this Court's *C. & O. Ry. Co.* v. *Martin*, 283 U.S. 209, 219-20, which quotes with approval the rule that:

> "It is not proper to submit uncontradicted testimony to a jury for the sole purpose of giving the jury an opportunity to nullify it by discrediting the witness, when nothing more than mere interest in the case exists upon which to discredit such witness . ."

In the absence of any direct testimony linking UMW to the stoppages, the jury's finding of UMW liability is necessarily based on "speculation run riot" and, as *Moore* v. *C. & O. Ry. Co.*, 340 U.S. 573, 576 recites, "Speculation cannot supply the place of proof" (p. 578). It stands in sharp contrast to the Sixth Circuit's *Harnischfeger Corp.* v. *Sheet Metal Workers*, 6 Cir., 76 LRRM 2268 (1970) where, dealing with liability of a parent union based on agency, the Sixth Circuit affirmed a lower court's holding that an international union was not liable for damages where it did not authorize picketing, advised against it, its constitution did not compel it and the national representative did not assert or claim to assert authority to terminate the picketing (p. 2272).

The Sixth Circuit's approval of the verdict conflicts with *Pennsylvania R. Co.* v. *Chamberlain*, 288 U.S. 333, 340-41, which precludes use of inferences as proof where there is "uncontradicted testimony of unimpeached witnesses . . that the facts sought to be inferred did not exist". *Chamberlain* approved (p. 340) the rule that:

> "When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof"

and

> "A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong".

Heretofore, the Sixth Circuit has followed the rule that *"to submit to a jury a choice of probabilities is but to permit them to conjecture or guess, and where the evidence presents no more than such choice, it is not substantial". Gulf Refining Co.* v. *Mark C. Walker & Son Co.*, 6 Cir., 124 F.2d 420, 425, 426; *Troutman* v. *Mutual Life Ins. Co. of N. Y.*, 6 Cir., 125 F.2d 769, 772; *U. S.* v. *Saunders*, 6 Cir., 325 F.2d 840, 843; *Dayton Veneer & L. Mills* v. *Cincinnati, etc. Ry. Co.*, 6 Cir., 132 F.2d 222, 223.

The foregoing discussion demonstrates not only errors in the Sixth Circuit's approval of the verdict, but that it stands in total contradiction of prior decisions of this and other courts and of the Sixth Circuit itself. Such "threat to the goal of uniformity" posed by the Sixth Circuit's decision serves to cause this Court's award to the Writ herein. *Hanna* v. *Plumer*, 380 U.S. 460, 463 (1965).

CONCLUSION

For the reasons assigned, Petitioner prays that the Writ of Certiorari should be granted and that the Writ issue to review the opinion and judgment of the Sixth Circuit entered in Case No. 19,589 as aforesaid. Petitioner intends to urge each of the questions presented, even if not specifically argued therein.

Respectfully submitted,

EDWARD L. CAREY
HARRISON COMBS
WILLARD P. OWENS
900 Fifteenth Street, N.W.
Washington, D. C. 20005

H. B. NOBLE
304 Main Street
Hazard, Kentucky 41701

M. E. BOIARSKY
512 Kanawha Valley Building
Charleston, W. Va. 25301

Attorneys for Petitioner, United Mine Workers of America

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Appendix A

No. 19589

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

BLUE DIAMOND COAL COMPANY, *Plaintiff-Appellee,* v. UNITED MINE WORKERS OF AMERICA, *Defendant-Appellant.*	APPEAL from U.S. District Court for Eastern District of Kentucky.

Decided and Filed December 15, 1970.

Before CELEBREZZE and McCREE, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

O'SULLIVAN, Senior Circuit Judge. The United Mine Workers of America appeal from a judgment entered upon a jury verdict awarding appellee, Blue Diamond Coal Company, $281,990.57 as damages for alleged breaches of the collective abrgaining contract between Blue Diamond and the UMW. The breaches claimed consisted of strikes—work stoppages—that occurred during 1962 and 1963. Action was brought under §301 of the Labor Management Relations Act of 1947, 29 USC §185. The damages awarded were based upon plaintiff's evidence of the losses it claimed to have sustained by reason of work stoppages allegedly caused or condoned by international representatives of the United Mine Workers. Our use of the initials UMW, the Union, or the Mine

Workers, shall mean the parent international union. Relevant parts of subsections of the Act, 29 U.S.C. §185, are as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> "(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. * * *
>
> "(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Appellant Mine Workers here charge error in the District Court's denial of its motions for a directed verdict, for judgment n.o.v. and for a new trial. To support its claim that it was entitled to a direction, it asserts that the contract between it and Blue Diamond did not forbid the work stoppages that did occur; that there was not sufficient evidence to warrant submission, for the jury's resolution, the responsibility of the United Mine Workers of America for such work stoppages; and that the evidence did not provide a measure of damages from which a monetary award could be made. Its alternative motion for new trial relied on all of the foregoing in addition to a claim that the jury's verdict was against

the weight of the evidence, was excessive, its amount was not supported by adequate and admissible evidence, and that the Court erred in its instructions to the jury. We shall discuss these assignments of error as follows:

1. Was the bargaining contract violated.

Appellant argues that even if the UMW participated in, and was responsible for, the work stoppages, such stoppages did not violate the contract. Blue Diamond claims that it was agreed that whatever dissatisfactions precipitated the stoppages, it was the contracted duty of the UMW and all of its members employed by Blue Diamond to resolve these difficulties through the established grievance procedures, ending if necessary with binding arbitration without resort to strikes or work stoppages. The District Judge sustained the position of Blue Diamond and, in submitting the case to the jury, told them:

> "At the time and upon the occasions detailed in the evidence, it was the contractual duty of the defendant Union to settle and resolve all disputes, troubles, and grievances at the plaintiff's mine by the procedures as set out in the contract by the parties, rather than to resort to strikes or other pressures. If you believe from the evidence that the defendant Union induced, encouraged, prolonged or ratified any of the strikes, described in the evidence, or induced, encouraged, prolonged or ratified a deliberate program of non-cooperation designed and intended to injure the plaintiff company, then to the extent you so believe you should consider the defendant Union to have breached its contract, and you should find for the plaintiff, * * *; but unless you so believe the defendant Union breached its contract, you should find for the defendant."

The contract in force at the time of the work stoppages

was the National Bituminous Wage Agreement of 1950, as amended in 1958. It contained the following:

> "The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the Courts.
>
> * * *
>
> **"Settlement of Local and District Disputes.**
>
> "Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately:
>
> 1. Between the aggrieved party and the mine management.
> 2. Through the management of the mine and the Mine Committee.
> 3. Through District representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.
> 4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

"A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement."

The UMW argues that notwithstanding such provision, the contract did not outlaw the use of work stoppages as a means of resisting impairment of the rights of employees, or as a method of vindicating them. This is so, appellant argues, notwithstanding the contract's clear language that,

> "All disputes and claims * * * *shall* be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement."

The basis of this argument is that early contracts between the UMW and Blue Diamond had "no strike" clauses and used the word "exclusively" in setting out that disputes would be settled by the contract's grievance procedure; that the elimination of such clauses evidenced the contract's intention that strikes to enforce employees' demands would not violate the contract; and that the stipulation that "*all* disputes *shall* be settled by the machinery provided" was no more than a "gentleman's agreement" unenforceable at law.

We are of the view that this Circuit has held such contention invalid. In *Lewis* v. *Benedict Coal Corp.*, 259 F(2) 346 (6th Cir. 1958), affirmed by an equally divided Supreme Court, 361 U.S. 459 (1960), Mr. Justice Potter Stewart, then a member of this Court, held that the express elimination of the "no strike" clauses that had been contained in earlier standard contracts negotiated by the Mine Workers, did not render unenforceable the above expressed obligation to settle *all* disputes through the current contracts. There it was stated:

> "It is true that the agreement expressly stated that the 'no strike' provisions of the previous contracts were superseded. However, the agreement provided in detail the procedure to be followed for the settlement of localized disputes or grievances." 259 F (2) at 350.

It is true that in the contract before us in *Benedict Coal,* the word "exclusively" was employed relative to the obligation of both parties to use the grievance procedure. It provided that disputes "shall be settled and determined *exclusively* by the methods provided in the 'Settlement of Local and District Disputes' section of this Agreement." We, however, do not consider that the elimination of such word, any more than the express abrogation of the "no strike" clauses in *Benedict Coal,* rendered the clear language of the contract before us—that disputes *shall* be settled through the grievance procedure—mere words of exhortation. At the time Justice Stewart wrote in *Benedict Coal,* the standard UMW contract had, in 1952, been revised to eliminate the word "exclusive" and some other provisions. Of this Justice Stewart said:

> "These sections [Settlement of Local and District Disputes] were revised in the 1952 amendment, but

> the obligation to resort to the specified procedure was not substantially changed." 259 F(2) 350.

By footnote to the above, Justice Stewart set out the exact relevant language of the contract now before us, in which the word "exclusively" had been deleted, emphasizing that such deletion did not substantially change the obligations of the contracting parties. This Court's opinion continues:

> "Determination of this preliminary issue thus depends upon what effect the agreement to settle all local disputes in accordance with the 'Settlement of Local and District Disputes' procedure had upon the right to strike which was expressly preserved in the 1950-52 agreement. The question is not without precedent. The same basic issue was thoroughly considered in United Construction Workers v. Haislip Bakery Co., 4 Cir., 1955, 223 F.2d 872, 873; W. L. Mead, Inc. v. International Brotherhood of Teamsters, etc., D.C., 126 F. Supp. 466, affirmed 1 Cir., 1956, 230 F.2d 576; and International Union, United Mine Workers of America v. National Labor Relations Board, D.C. Cir., 257 F.2d 211. With all respect for the majority view expressed in the latter decision, we agree with the dissenting judge in that case, and with the decisions in the Haislip and Mead cases, that a strike to settle a dispute which a collective bargaining agreement provides shall be settled by an exclusive and obligatory alternative procedure constitutes a violation of the agreement." 259 F(2) at 351.

As stated, we expressed our agreement with the dissent in *International Union, United Mine Workers of America* v. *National Labor Relations Board,* 257 F(2) 211 (D.C. Cir. 1958). There the UMW made the same contention as to the effect of the elimination of a "no strike" clause contained in earlier contracts. Mr. Chief Justice Burger,

then a member of the District of Columbia Circuit, writing in dissent, said:

> "The majority opinion rests its reversal of the Labor Board action on the ground that the collective bargaining contract *does not* contain an affirmative 'no strike' clause, but it overlooks what the contract *does* contain, namely a solemn agreement by both parties to submit *all disputes* to an agreed process of negotiation leading finally to a binding arbitration if the preliminary steps are not successful. The mutual promises to settle all grievances by this peaceful process are plain and unambiguous, and this indeed is not disputed."
>
> * * * *
>
> "I cannot accept the view of the majority that these explicit detailed contractual provisions represent merely a loose 'gentleman's agreement' that the parties will *try* to resolve their problems without strikes or lockouts; to me they are the words of contracting parties who intend to set up binding provisions for what experience has taught is effective machinery for the day to day bargaining between management and employees. They are the words of enlightened union and management leaders who intend to abandon brutal and wasteful methods and substitute negotiation and arbitration as a means of settling disputes." 257 F(2) at 218, 219.

We adhere to the rule of our *Benedict Coal* case, and that of the dissent in *International Union, supra,* and believe these decisions fit the case before us. We consider that this holding is consonant with the Supreme Court's emphasis in *United Steel Workers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960), and *Teamsters Local* v. *Lucas Flour Co.,* 369 U.S. 95 (1962), of the high good of substituting employment of grievance procedures and arbitration for the warfare of strikes.

The contract provided for settlement of disputes, making clear that it is not necessary that this Court speculate or make a finding as to the objective of abrogating the earlier "no strike" clause and the elimination of the word "exclusively". Nothing herein is intended to hold that the bargaining contract should be read as imposing liability upon UMW for spontaneous or wildcat strikes in which it had no part by way of causing or prolonging such strikes. The District Judge told the jury:

> "This suit is against the United Mine Workers of America. The local union is not a party to the contract, nor is it being sued in this action. Defendant United Mine Workers of America would not be liable for the action of the officers or individual members of the local union unless it is shown the United Mine Workers of America authorized, participated in, or ratified the acts of the local union or individual members after express knowledge of such acts, which are claimed to be violations of the contract."

2. Responsibility of UMW for work stoppages.

At all times here pertinent, Blue Diamond was a corporation engaged in coal mining in Perry County, Kentucky. It there operated two mines, Leatherwood No. 1 and Leatherwood No. 2. Blue Diamond's complaint charged that work stoppages or strikes, for which the international union was responsible, closed its mining operations for a total of 27½ days. One count of the complaint charged that UMW had coercively required plaintiff to enter into the National Bituminous Coal Wage Agreement, and thereafter discriminated against plaintiff by enforcing its contract against it but allowing its competitors, signatories to the same contract, to ignore the contract terms; and also caused slow downs by plaintiff's employees. As to these contentions, the District

Judge granted the UMW motion for summary judgment. No appeal has been taken from such ruling.

The International Union of the United Mine Workers of America was the bargaining representatives of the employees of Blue Diamond. Blue Diamond was a signatory of the National Bituminous Coal Wage Agreement of 1950, as amended in 1958. There was also a Local Union of the employees of Blue Diamond with its own officers and committee, but it was not a signatory to the above contract. The International Union is divided into geographic districts and the Blue Diamond mines were located in District 30. The officers of this District 30 are appointed by the International Union which also controls the policies which govern the relations between the mine owners and their employees. In 1962 and 1963, C. E. Beane was President of District 30 and a member of UMW's International Board; Bill Perkins was a representative of the International assigned to District 30, working under Beane; Squire Feltner was a field representative of the International for District 30. Officers of Local No. 8280 and its Mine Committee were elected by members of the local union employed at Leatherwood No. 1. All UMW members are subject to the "supreme authority" of the International and its Executive Board, which has the power to revoke the charter and penalize members for engaging in unauthorized work stoppages. The differences in United Mine Workers' control and responsibility for district representatives, as opposed to local unions and their members and officers, is recognized and not subject to dispute.

The evidence showed that for some five years prior to February, 1962, there had been but one work stoppage by Blue Diamond employees at Leatherwood No. 1. That

occurred in 1959 when its employees joined other miners for two days in picketing non-union mines. Contrasted with this experience, commencing in February, 1962, and continuing into January, 1963, Blue Diamond was harassed by work stoppages in the commencement and continuance of which the officers of the International allegedly played such a part as amounted to breaches of the union's contract with Blue Diamond. If such was proven, Blue Diamond was entitled to recover for such violations under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185.

Plaintiff contended that statements by Bill Perkins and Beane evidenced the reasons for the commencement and continuance of the period of harassment. While witnesses for the Union (which term shall refer here to the International Union of the UMW, unless otherwise indicated) denied much of the testimony of plaintiff's witnesses, the jury was at liberty to find the following facts.

Across the hollow from Leatherwood mine No. 2 was a mine owned by Blair Fork Coal Company, a subsidiary of Blue Diamond. On February 5, 1962, the UMW filed with the National Labor Relations Board a charge, signed by Bill Perkins, asserting that Blair Fork Coal Company was encouraging its employees to join the Southern Labor Union, a rival of UMW. On February 28, 1962, Beane, District President of UMW, talking to the man in charge of Blue Diamond's labor relations, said that he, Beane, wished to cooperate with Blue Diamond, but if he ever found out that Blue Diamond was involved in the Blair Fork Coal Company mine, he did not know whether or not there was going to be any further cooperation between the Union and Blue Diamond.

Another witness for the company who heard Beane's statements of February 28, 1962, gave this recital of them:

> "He stated that there had been cooperation between the U.M.W. and Blue Diamond Coal Company, but he had heard rumors to the extent that Blue Diamond Coal Company had acquired some adjacent property, Blair Fork by name; and that they were attempting to run it as a scab mine or something of that nature. He said he was checking into this and if he found out that it was so that all cooperation would cease, and he stressed again that he was looking into it and intended to find out."

Plaintiff argues that it would be fair to infer from the foregoing that the UMW representatives did find out about Blue Diamond's interest in Blair Fork and that UMW's subsequent conduct was fulfillment of UMW's threat "that all cooperation [with Blue Diamond] would cease."

Thereafter, on May 21, 1962, one John Slyger, a loading operator at Blue Diamond's Leatherwood No. 1 mine, refused to operate a loader without a helper and was discharged. A general strike at Leatherwood No. 1 followed on May 22 and 23. Thereafter, the men returned to work and the initial steps of the grievance procedure were taken to resolve the validity of Slyger's discharge. On May 28, representatives of the union and the company met as the third step of the procedure. Perkins, representative of the International for District 30, came to the meeting accompanied by the local union's mine committee and its President. Upon his arrival, Perkins said to the company representatives, "I can save a whole lot of time if you will answer one question for me * * *. Are you going to put him [Slyger] back to

work?" Upon receiving a negative reply, Perkins, with the mine committee and President, left without further discussion. A general strike followed the next morning, May 29, and continued through five days, ending on June 4.

On August 20, 1962, Perkins was again present at a meeting which included representatives of the local union, as well as the company representatives. There was a discussion relative to shift seniority. Perkins was described as being in an angry mood, and asked the company people, "Where is your chain?" This question was apparently prompted by the fact that at a mine known as the Scotia Coal Company mine, owned by Blue Diamond, Perkins was frustrated in his efforts to organize the miners there employed by a chain across the mine's entrance. The personnel director of Blue Diamond gave this account of the additional remarks of Perkins:

> "I didn't say anything and we went on in the meeting and he kept talking and he said that in the past he had instructed the Committee and the men there to cooperate with us and to work overtime when we needed it, but since we wouldn't let him go in on the property over at our Scotia Coal Company mine above Cumberland to organize the men that he was instructing the Committee right then and there in front of us that there wouldn't be no more overtime work and there would be no more cooperation and he said, 'It looks like it is going to be a fight to the finish, and we are going to go down fighting.' And Mr. Sheets asked him if not working overtime wasn't against the contract, and he said, 'To hell with the contract.' "

Another company representative told it this way:

> "He [Perkins] was real angry and he asked us as we went into the office, 'Where in the H--- the

chains were' and I didn't know what he was talking about and he said all he had been able to do for some time was to get chains and guards; that he had been to this property that we owned and had tried to get in on this property and organize the men there and talk to them, and he said he hadn't even had a chance to get on the property to talk to them and he was extremely angry about it. He said if that was the attitude that the Company was going to use, that he wanted us to know there and then that there would be no more cooperation from the U.M.W. He said at one time that he had instructed the tipple especially to work overtime in order to help us out and asked the men to work overtime to help us out; but he said, "I want you to know that has ended,' and he instructed the Mine Committee and the Local officers that were there in my presence and told them — he said, 'From now on, there will be more (sic) overtime work at this mine. I want that understood.' And he turned to me and said, 'If you fire one of these men for this,' he said, 'We will strike.' And I asked him, I said. 'Mr. Perkins, isn't this against the contract?' And he said, 'To hell with the contract,' and with that the meeting was terminated."

Following the August 20 meeting, just described, there was a one-half day work stoppage on August 24, 1962. No grievance had been filed in advance of this stoppage. While plaintiff argues that this was a way of emphasizing Perkins' "to hell with the contract" statement of August 20, we feel this one-half day work stoppage cannot be charged to defendant.

On October 1, 1962, there was another work stoppage for a single day, apparently because of work performed by a foreman. While there was no grievance procedure invoked, there is no evidence upon which responsibility for it could be placed on the International.

Beginning on December 3, 1962, there was another strike lasting five days. Following this, there was a work stoppage beginning January 8, 1963, which lasted through fourteen working days. These work stoppages were allegedly the result of the workers at Blue Diamond's Leatherwood No. 1 mine refusing to cross picket lines thrown about that mine by so-called roving pickets, miners who had been employed at Blue Diamond's Leatherwood mine No. 2. This activity followed Blue Diamond's cancellation of its contract with UMW covering its employees at Leatherwood mine No. 2. There was evidence to resist Blue Diamond's cancellation of the contract at Leatherwood No. 2, employees there would come over and picket Leatherwood No. 1, whose men would not cross the picket line thrown up by Leatherwood No. 2 miners. The No. 1 miners would then go over and picket mine No. 2. There was evidence that during this activity Perkins, very much in evidence, was talking to the pickets and otherwise participating in what was going on. He testified that he attempted to get the employees of No. 1 to go back to work. However, there was evidence by former members of the UMW who had taken part in these strikes that Perkins would say to the strikers, "My job is to tell you fellows to go back to work," but this would be coupled with the further advice that, "You could read between the lines." A variation of this was that they — the strikers — "ought to know what to do." Miners giving this testimony emphasized that the statements of Perkins were understood as suggestions that the miners should continue their strike or at least that Perkins would go along with it. One witness put it this way when asked the meaning of Perkins' "you know what to do." "Meant I didn't work, stayed on strike." The defendant UMW was aware

of these December 1962 and January 1963 work stoppages, and there was evidence that the head office in Washington was directing Perkins and others to have the men go back to work. We are satisfied that the total evidence was sufficient to cast responsibility for the December 1962 and January 1963 strikes upon defendant.

Plaintiff claimed that it was entitled to damages for 27½ days that its mine was down due to illegal work stoppage. We, however, are of the opinion that as to the two-day stoppage on May 22 and May 23, 1962, the one-half day stoppage on August 24, 1962, and the one-day stoppage on October 1, 1962, there was not sufficient evidence from which a jury could find that they were otherwise than spontaneous stoppages, not chargeable to the International UMW. As to the remaining 24 days, we are satisfied that there was evidence from which the jury could affix responsibility therefor upon the defendant UMW. No citation of authority is necessary to support the rule we follow here, viz: that in testing the sufficiency of evidence to warrant submission of factual issues to a jury, the evidence and the legitimate inferences to be drawn therefrom must be viewed in the light most favorable to the party seeking the jury's verdict. In a case brought under the Federal Employers' Liability Act, the Supreme Court in *Lavender* v. *Kurn*, 327 U.S. 645 (1946), discussed the rule as follows:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the con-

> clusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." 327 U.S. at 653.

The Supreme Court there was dealing with a suit under the FELA whereas the suit here is brought upon another federal statute—Section 301 of the Labor Management Relations Act. We are aware of the liberality applied in testing the sufficiency of plaintiff's evidence in FELA cases, but we also took occasion to employ the above language of the Supreme Court in testing the sufficiency of a plaintiff's evidence in a diversity case not involving the FELA. See *Lones* v. *Detroit, Toledo & Ironton R.R.*, 398 F(2) 914, 919 (6th Cir. 1968). In *Smith* v. *Illinois Central R.R.*, 394 F(2) 254 (6th Cir. 1968), we said:

> "These issues all present questions of fact which must be determined by the jury, if they are supported by evidence. In determining a motion for a directed verdict in favor of one of the parties, the court must consider the evidence in the light most favorable to the party against whom the motion is made and must take into account any reasonable inferences that may be drawn from the facts in evidence. Smith v. Sloan, 189 Tenn. 368, 225 S.W.2d 539, 227 S.W.2d 2; Minton v. Southern Railway Company, 368 F.2d 719 (C.A. 6); Wallace v. Louisville and Nashville Railroad Company, 332 F.2d 97 (C.A. 6)." 394 F(2) at 256.

There is evidence that beginning in May, 1962, the UMW promised Blue Diamond a "bad time" in its rela-

tions with UMW. The May predictions and even stronger promises of antagonism such as "to hell with the contract" and like truculent expressions would be persuasive to any factfinder that Perkins was a party to, or the author of, the work stoppages involved. Perkins' activity around the picket lines during the December and January strikes and the language he employed in allegedly urging the men back to work provide a legitimate basis for the jury to conclude that he and, through him, others knew what was going on and were parties to the violation of the contract between Blue Diamond and UMW. An intelligent jury could listen *cum grano salis* to the UMW protestations of its impotence to control the miners who were subject to its authority.

In *Lewis* v. *Benedict Coal Corp.*, 259 F(2) 346, *supra*, Justice Stewart, writing for this Court, held that the evidence in that case was sufficient to permit the jury to award damages resulting from some eight of eleven work stoppages. He said:

> The second basic contention of the International Union and District 28 is that even if the agreement prohibited strikes with respect to local disputes, the strikes in question were not authorized or ratified by the International Union or District 28. It is clear from the record that the district judge was not in error in instructing the jury that District 28 and its agents were agents of the International Union with respect to the activities involved here. *The real issue is whether the District's agent did induce the strikes in question. The evidence on this issue was sparse and conflicting, but was sufficient to sustain the jury's finding.* Scott, a former employee of Benedict and a member of the local mine committee, testified that prior to the first strike and several times thereafter he was told by Scroggs, a field representative of District 28, *"I can't tell you*

boys when to strike. I can't tell you to strike, but when I tell you when you don't get what you want why you boys know what to do." Scott was then permitted to testify as to his understanding of Scroggs' statement. Scroggs unequivocally denied having made this statement. By their finding the jury chose to believe Scott rather than Scroggs. This was their prerogative." (Emphasis supplied.) 259 F(2) at 351-352.

We hold that the evidence was sufficient to permit the jury to award damages for the several work stoppages, except those which occurred on May 22 and 23, 1962, August 24, 1962, and October 1, 1962.

3. Computation of Damages.

To establish its losses from the several strikes, Blue Diamond offered the testimony of its Vice-President and Secretary who computed the damages suffered as a consequence of the several work stoppages. Using the company's own records, his method is set out in appellee's brief to this Court as follows:

"Blue Diamond started by determining, as best it could, the amount of tonnage lost by these strikes. To do this, it divided the total number of tons of coal actually produced each month by the number of actual operating days in that same month, thereby giving a reasonably accurate average per day production figure. It then multiplied this daily production figure by the number of strike days, thereby ascertaining the number of tons lost by the strike. To convert this figure into a dollar amount, it took the average selling price of coal, per ton, during that month, and multiplied it by the amount of tons lost. This furnished, with the greatest amount of accuracy possible, the actual loss of revenue in dollars which were attributable to the strike. Next, the company showed its actual realization (total

receipts from total sales) during the month, and its actual cost of production during the same month. The difference between these figures revealed the actual loss or profit to the company during that month. Next, it projected what its total receipts would have been by adding actual receipts to the dollar figure which had been determined for tons lost by the strike. This gave a projected or anticipated total realization for the month, had there been no strike. It then projected, upon the basis of experience and knowledge, the added cost of production had the added tons been produced, and this estimate was broken down in the most logical way possible. It then added to its actual production cost the additional cost of production estimated for the lost tonnage, which would give a projected or anticipated total production costs for all the coal, both that which was mined and that which was lost. The comparison of these figures, like the actual experience, would then reveal what the total profit or loss would have been had there been no strike. In the course of pointing out this form of computation, it was also explained that the cost of production of coal per ton diminished as the production increased—this due to the fact that there were substantial fixed costs, regardless of the amount of production, and that these fixed costs diminished per ton as the number of tons increased."

The method thus employed was reviewed by a Certified Public Accountant employed by the firm of Ernst & Ernst. He supported the validity of the method used and the results thereof. The appellant UMW produced a C.P.A. who employed his own method of computing plaintiff's damages, coming up with a total figure grossly below that of Blue Diamond's witness. On cross-examination, however, he agreed that his own methods could be wrong, and those used by Blue Diamond correct. It

was for the jury to determine the correctness of the competing methods employed. Plaintiff's testimony in such regard was sufficient to allow them to do so. In *Riverside Coal Co.* v. *United Mine Workers of America,* 410 F(2) 267 (6th Cir. 1969), we said:

> "The questions raised concerning damages are essentially questions of fact, and at least with regard to the alleged damages resulting from lost profits, the law is clear and not disputed. As stated in United Mine Workers v. Osborne Mining Co., *supra,* 279 F.2d at 727:
>
> > 'Profits are recoverable where there is an established business and they can be proven with reasonable certainty.'
>
> Lost profits are not recoverable when based upon 'sheer speculation and guesswork' Mitchell Coal Co. v. UMW, 313 F.2d 78, 79 (6th Cir. 1963).
>
> "It has long been recognized that once the fact of damage has been properly shown, 'uncertainty as to their amount will not foreclose recovery.' Flame Coal Co. v. UMW, 303 F.2d 39, 44 (6th Cir. 1962) cert. denied, 371 U.S. 891, 83 S.Ct. 186, 9 L.Ed.2d 125; Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-563, 51 S.Ct. 248, 75 L.Ed. 544 (1931); Hi Hat Elkhorn Coal Co. v. Inland Steel Co., 370 F.2d 117, 118 (6th Cir. 1966)." 410 F(2) at 274.

The damages estimated by plaintiff's witnesses totalled $281,990.57; such was the amount of the jury's verdict. Except as to the several work stoppages which we hold cannot be charged to the UMW, the jury's verdict was not excessive.

4. The Court's instructions.

a) General.

Appellee proffered an instruction whereby the jury would be told that an award of damages could not be "based upon guess," that plaintiff could not "recover remote, uncertain, or speculative damages" and that damages had to be proved "by the preponderance of the evidence with reasonable certainty." Our own review of plaintiff's proofs of damages discloses that they provided a method for computing them without resort to guess, speculation or substantial uncertainty. The District Judge told the jury that if they found that defendant UMW had breached its contract,

> "you should find for the plaintiff, awarding it such damages, if any, as you shall believe from the evidence were suffered by plaintiff as a direct result of the defendant's breach of the contract as above conditioned and described; but unless you so believe the defendant Union breached its contract, you should find for the defendant. * * *
>
> "If under these instructions the Jury believes plaintiff is entitled to recover from the defendant on plaintiff's claim for loss of production by reason of the strikes referred to in the evidence, then you will award plaintiff such a sum in damages as you may find from the evidence will fairly and reasonably compensate plaintiff for the loss of profits it is reasonably certain it would have made in its coal mining operation but for the occurrence of said strikes."

We consider that the jury was correctly instructed on the matter of damages. Proffered, but refused, instructions to the jury that the UMW would not be responsible for spontaneous or wildcat strikes, were adequately covered by the District Judge's instruction that,

> "This suit is against the United Mine Workers of America. The local union is not a party to the contract, nor is it being sued in this action. Defendant United Mine Workers of America would not be liable for the action of the officers or individual members of the local union unless it is shown the United Mine Workers of America authorized, participated in, or ratified the acts of the local union or individual members after express knowledge of of such acts, which are claimed to be violations of the contract."

b) Instructions on burden of proof.

Special criticism is directed at the District Judge's failure to tell the jury that the burden was on the plaintiff to prove its case *by a preponderance of the evidence.* In refusing to do so, the District Judge chose to follow a relevant Kentucky rule. It is the rule in Kentucky that instructions to a jury should not include such an instruction. *Ragsdale* v. *Ezell,* 99 Ky. 236, 239 (1896). *Macon* v. *Paducah St. Ry.,* 110 Ky. 680, 689 (1901); *Mills* v. *Louisville & N. R.R.,* 116 Ky. 309, 316 (1903); *Gorman* v. *Berry,* 289 Ky. 88, 91 (1942). In *Ragsdale, supra,* the Court gave, in part, the reason for its special rule in this regard—"The word preponderance should be omitted from such instructions, *as it is only calculated to embarrass the jury when considering the issue.*" 99 Ky. at 239. The Court in *Ragsdale* further said of the Kentucky rule,

> "[W]here a trial court undertakes to place the right of recovery upon the preponderance of testimony in favor of the plaintiffs or those holding the affirmative of the issue, it often becomes necessary to explain what is meant by the preponderance of proof, and in doing so a jury is often misled by the trial court. On an issue of fact the party holding the

affirmative or making the charge must make out his case, and when testimony is introduced on both sides as in this case the jury should be told: 'If they believe from the evidence the defendant, Ragsdale, assaulted the plaintiff as charged in the petition the plaintiff is entitled to recover * * *'." 99 Ky. at 238.

In *Macon, supra,* the Kentucky Court said:

"The jury were told in No. 2 that the burden is upon the plaintiff to prove negligence. This court has often condemned instructions stating upon whom the burden of proof rested, or similar expressions." 110 Ky. at 689.

In *Mills, supra,* the Court said:

"* * * the court should not instruct the jury upon burden of proof, but simply so frame the instructions as to indicate on whom the burden of proof lies." 116 Ky. at 316.

Rule 43.01 of Kentucky's Rules of Civil Procedure provides:

"(1) The party holding the affirmative of an issue must produce the evidence to prove it.

"(2) The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side."

In lieu of the requested instructions, and following the Kentucky rule, the jury was charged variously, "If breach of the contract has been established by the evidence * * *," and "If you believe from the evidence," and like expressions.

Appellant argues that the action here is the creature of Congressional enactment and that § 301 of the LMRA does not merely confer jurisdiction upon the United

States Court to hear suits for violation of bargaining agreements, but that federal law, substantive as well as procedural, controls. In *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957), dealing with a suit under § 301 for specific performance of an arbitration clause of a collective bargaining contract, it was said:

> "The question then is, what is the substantive law to be applied in suits under §301(a)? We conclude that the substantive law to apply in suits under §301(a) is federal law which the courts must fashion from the policy of our national labor laws." 353 U.S. at 456.

The above pronouncement did not relate to the style of instructions to a jury. Neither the Supreme Court nor any of the Circuits have as yet fashioned a relevant controlling rule. We read appellant's claim, however, to be that if we are now to fashion a relevant rule, "the policy of our national labor laws" commands that such rule must require that in an issue arising under §301, the jury must be told that *the burden of proof is upon a plaintiff to prove the elements of its case by a preponderance of the evidence.* This is so, the argument proceeds, because we should consider that the foregoing is the better rule. It may be conceded that where the burden of proof lies is a matter of substantive law, *Central Vermont Ry.* v. *White,* 238 U.S. 507 (1915). This, however, is not to say how a jury shall be instructed. Nothing in *Lincoln Mills or Central Vermont, supra,* would forbid us in our job of fashioning a rule to control the style of a relevant jury instruction, from employing the rule of the state in which a cause is tried. That such is permissible is confirmed by Mr. Justice Douglas' language in *Lincoln Mills.*

> "But state law, if compatible with the purpose of §301, may be resorted to in order to find the rule

> that will best effectuate the federal policy." 353 U.S. 457.

And that was what was done in *Jackson County* v. *United States*, 308 U.S. 343, 351, 352 (1939). It has been held that where a cause of action is created by an Act of Congress without such Act containing a statute of limitations, the federal courts will apply the limitations statute of the forum state. *Cope* v. *Anderson*, 331 U.S. 461, 463 (1947); *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 704 (1966); *Englander Motors, Inc.* v. *Ford Motor Company*, 293 F(2) 802, 804 (6th Cir. 1961). Similarly, the federal courts are instructed by Rule 43(a) of the Fed. R. Civ. P. that regardless of the applicable federal statutory or court made rule, they are to apply the comparable state evidentiary rule if it is more favorable to the reception of evidence. This is true for federally created causes of action as well as in diversity cases.

While the case before him did not involve a cause of action created by an Act of Congress, our late colleague, Judge Shackelford Miller, Jr., then a District Judge, in *Mutual Life Ins. Co.* v. *Green*, 37 F. Supp. 949 (W.D. Ky. 1941), employed language helpful to us here. Before him was a diversity suit upon an insurance policy. Instructions which he had given to a jury under the Kentucky rule were charged as erroneous upon a motion for new trial. It was contended that notwithstanding *Erie* v. *Tompkins*, an instruction referring to the preponderance of evidence rule was an essential element of trial by jury in the federal courts, as guaranteed by the Seventh Amendment to the Constitution. In denying the motion, Judge Miller said:

> "It is contended, however, that the preponderance rule is an essential element of the trial by jury in

> the Federal Courts which right is reserved to all litigants in the Federal Courts by the Seventh Amendment to the United States Constitution. We do not agree with that contention. * * *
>
> "Since the requested instruction is not required by the United States Constitution, or by any act of Congress, we believe that the instruction which followed the state practice was the proper one under the ruling announced by *Erie Railroad Co.* v. *Tompkins, supra.*" 37 F. Supp. at 954.

It is not essential that we undertake a comparative study of the relevant Kentucky form of instruction with that more than generally in use, and make a judicial choice of the one we prefer. While the Kentucky opinions provide but meager elucidation of its rule, it can be argued that telling a jury, "If you believe from the evidence" may actually require a greater burden of proof than "by a preponderance of the evidence." We call to mind the varying expressions employed by trial judges to tell juries the meaning of preponderance of the evidence, and do understand Kentucky's view that these efforts may indeed make a jury's task more difficult than Kentucky's "if you believe." We hold, therefore, that by using Kentucky's rule the District Judge did not offend any special and relevant federal common law of procedure.

Without derogating the entitlement of all litigants to have a case submitted to a jury in conformity with law, we are of the view that the difference between Kentucky's rule and the more conventional style of instruction is not such that the use of the Kentucky style in this case denied appellant any "substantial right." 28 U.S.C. 2111 and Rule 61, F.R.Civ. P.

We have considered appellant's other criticisms of the court's charge and claims of error and find them without merit.

Using the method employed by plaintiff to prove its losses, we have concluded that such part of the jury's total award which was allowable to the 3½ days for which we are not allowing recovery amounted to $34,095.79. Accordingly, the judgment for plaintiff is reduced to the sum of $247,894.78 and, so reduced, is hereby affirmed.

McCREE, Circuit Judge, with whom CELEBREZZE, Circuit Judge, joins, concurring in the result. The United States Supreme Court has made it clear that "the subject matter of § 301(a) 'is peculiarly one that calls for uniform law' " [citations omitted]. *Teamsters Local 174* v. *Lucas Flour,* 369 U.S. 95, 103 (1962). It is also clear that the burden of proof may affect the substantive rights of the parties, and in cases determining rights created by federal statute, the applicable rule is to be determined by reference to federal law. *See Central Vermont Railway Company* v. *White,* 238 U.S. 507, 510-12 (1915); *cf. Garrett* v. *Moore-McCormack Co., Inc., et al.,* 317 U.S. 239, 248-49 (1942); *Hill, et al.* v. *Smith,* 260 U.S. 592, 594 (1923). Of course diversity cases are not apposite here because we are concerned with a federal cause of action. Nevertheless, I believe, the requirement that federal courts apply, in diversity cases, the burden of proof of the state in which they sit supports my conclusion that burden of proof is outcome determinative. See IA J. Moore FEDERAL PRACTICE ¶0.314[2], at 3506 (2d ed. 1965); 5 *id.* ¶43.08, at 1360-61. I am not persuaded otherwise by the fact that state statutes of limitation are applicable in suit under § 301 since

> [i]t is clear that Congress gave attention to limitations problems in the Labor Management Relations Act, 1947; it enacted a six months' provision to govern unfair labor practice proceedings, 61 Stat. 146, 29 U.S.C. § 160(b) (1964 ed.), and it did so only after appreciable controversy. In this context, and against the background of the relationship between Congress and the courts on the question of limitations provisions, it cannot be fairly inferred that when Congress left § 301 without a uniform time limitation, it did so in the expectation that the courts would invent one.

Auto Workers v. *Hoosier Cardinal Corp.*, 383 U.S. 696, at 703 (1966).

I would hold that federal district courts must uniformly instruct the jury to decide in accordance with the preponderance of the evidence. To hold otherwise might encourage state courts to attempt to vindicate important federal rights, created by the Congress, in disparate fashion by applying local law.

In this case, however, I am convinced that the court below did not prejudice appellant by using the Kentucky burden of proof jury instructions. The requirement that the jurors "believe from the evidence" in effect requires that they be persuaded by the weight of the evidence. Accordingly, I concur in the decision to affirm.

Filed December 15, 1970

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 19,589

BLUE DIAMOND COAL COMPANY,
Plaintiff-Appellee,

vs.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellant.

Before: CELEBREZZE and McCREE, Circuit Judges and O'SULLIVAN, Senior Circuit Judge.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed as modified.

It is further ordered that Plaintiff-Appellee recover from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.
CARL W. REUSS
Clerk

A True Copy.

Issued as Mandate:

Filed March 27, 1968

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

BLUE DIAMOND COAL COMPANY, a corporation,
Plaintiff
v.
UNITED MINE WORKERS OF AMERICA,
Defendant
Civil Action, File No. 444
Jackson

ORDER AND JUDGMENT

This action came on the trial (hearing) before the Court, Honorable Bernard T. Moynahan, Jr., United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged

(1) That the plaintiff Blue Diamond Coal Company recover of the defendant United Mine Workers of America the sum of $281,990.57 as "strike" damages, with interest thereon at the rate of six per cent as provided by law, and its costs of action;

(2) That the plaintiff Blue Diamond Coal Company take nothing as relates to its claim for "slowdown" damages, and that its claim in the action for "slowdown" damages be dismissed on the merits.

DAVIS T. MCGARVEY, *Clerk*

APPENDIX B

Labor Management Relations Act, 1947:

Section 7 (29 USCA 157):

Right of employees as to organization, collective bargaining, etc. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title.

Section 13 (29 USCA 163):

Right to strike preserved. Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Section 301 (29 USCA 185):

Suits by and against labor organizations—Venue, amount, and citizenship.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

* * *

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Section 502 (29 USCA 143):

Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.

APPENDIX C

EXHIBITS

PLAINTIFF'S EXHIBIT 1

"AGREEMENT BETWEEN THE HAZARD COAL OPERATORS' ASSOCIATION AND THE INTERNATIONAL UNION U.M.W. OF A. AND DISTRICT NO. 30

SOUTHERN WAGE AGREEMENT

Effective April 1, 1941 to March 31, 1943

Executed in the City of Washington, D. C., July 5, 1941

"Washington, D. C., July 5, 1941.

"THIS AGREEMENT, made the 5th day of July, 1941 between the Operators' Association of Williamson Field, Big Sandy-Elkhorn Coal Operators' Association, Hazard Coal Operators' Association, Harlan County Coal Operators' Association, Kanawha Coal Operators' Association, Logan Coal Operators' Association, Southern Appalachian Coal Operators' Association, New River Coal Operators' Association, Pocahontas Operators' Association, Winding Gulf Operators' Association, Greenbrier Coal Operators' Association, Upper Buchanan Smokeless Coal Operators' Association, and Virginia Coal Operators' Association, voluntary associations on behalf of each member thereof hereinafter referred to as the Operators, party of the first part, and the International Union, United Mine Workers of America, and Districts 17, 19, 28 and 30, hereinafter referred to as the Mine Workers, and on behalf of each member thereof, party of the second part. (New districts of the United Mine Workers may be established in this territory.)

"WITNESSETH: It is agreed that this contract is for the exclusive joint use and benefit of the contracting parties

as heretofore defined and set forth in this Agreement. It is agreed that the United Mine Workers of America is recognized herein as the exclusive bargaining agency representing the employes of the parties of the first part. It is agreed that as a condition of employment all employes shall be members of the United Mine Workers of America, except in those exempted classifications of employment as provided in this contract. (See Note.) It is the intent and purpose of the parties hereto that this Agreement will promote and improved industrial and economic relationship in the bituminous coal industry, and to set forth herein the basic agreements covering rates of pay, hours of work, and conditions of employment to be observed between the parties in the following territory: Southern West Virginia, Virginia, Northern Tennessee, and that part of Kentucky lying east of a line drawn north and south through the City of Louisville."

* * * * *

"The Mine Workers intend no intrusion upon the rights of management as heretofore practiced and understood.

"Management of Mines

"The management of the Mine, the direction of the working force, and the right to hire and discharge are vested exclusively in the Operator, and the United Mine Workers of America shall not abridge these rights."

* * * * *

"Mine Committee

"A committee of three (3) Mine Workers, who shall be able to speak and understand the English language, shall be elected at each mine by the Mine Workers employed at such mine. Each member of the Mine Committee shall be an employee of the mine at which he is a

committee member, and shall be eligible to serve as a committee member only so long as he continues to be an employe of said mine. The duties of the Mine Committee shall be confined to the adjustment of disputes arising out of this Agreement and the mine management and the Mine Worker, or Mine Workers, have failed to adjust. The Mine Committee shall have no other authority or exercise any other control, nor in any way interfere with the operation of the mine; for violation of this clause any or all members of the Committee may be removed from the Committee.

"Settlement of Disputes

"Should differences arise between the Mine Workers and the Operator as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at any mine, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately."

* * * * *

"Pending the hearing of disputes, the Mine Workers shall not cease work because of any dispute;"

* * * * *

"Illegal Suspension of Work

"A strike or stoppage of work on the part of the Mine Workers shall be a violation of this Agreement. Under no circumstances shall the Operator discuss the matter under dispute with the Mine Committee or any representative of the United Mine Workers of America during suspension of work in violation of this Agreement."

* * * * *

"District Conferences"

* * * * *

"Prior practice and custom not in conflict with this Agreement may be continued."

* * * * *

"AGREEMENT

HAZARD COAL OPERATORS' ASSOCIATION
AND DISTRICT 30
UNITED MINE WORKERS OF AMERICA.

"Agreement Between the Hazard Coal Operators' Association, Parties of the First Part, and Members of District No. 30, United Mine Workers of America, Parties of the Second Part, September 10, 1941, to March 31, 1943.

"WITNESSETH

"First—The Southern Wage Agreement effective April 1, 1941, to March 31, 1943, executed in the City of Washington, D. C., July 5, 1941, is hereby made a part of the agreement between the Hazard Coal Operators' Association and District 30 United Mine Workers of America."

* * * * *

"If any man refuses to continue at work because of a grievance which has or has not been taken up for adjustment in the manner provided herein, and such action shall seem likely to impede the operation of the mine, the mine committee shall immediately furnish a man or men to take such vacant place or places at the scale rate, in order that the mine may continue at work, and it shall be the duty of any member or members of the United Mine Workers of America who may be called upon by the mine foreman or mine committee to immediately take the place or places assigned to him or them in pursuance hereof."

* * * * *

"Discipline

"All questions of dispute shall be considered and finally disposed of as provided for in this contract.

"The United Mine Workers of America recognizes that the very fundamentals upon which collective bargaining is founded are the strict observance of agreements by both parties to this contract. Local strikes will not be tolerated. Every member of the United Mine Workers of America under the jurisdiction of this Agreement pledges himself to cooperate with and assist every officer of the organization of the United Mine Workers of America in preventing local strikes. Every officer of the United Mine Workers of America pledges himself to do everything possible to make this declaration effective. Where a man is responsible for closing down a mine in violation of Contract he may be discharged."

* * * * *

"Illegal Suspension of Work

"A strike or stoppage of work on the part of the Mine Workers shall be in violation of this Agreement. Under no circumstances shall the Operator discuss the matter under dispute with the Mine Committee or any representative of the United Mine Workers of America during suspension of work in violation of this Agreement."

* * * * *

"Penalties

"Should any Mine Worker or Mine Workers at the mine cause the mine or part of the mine to shut down in violation of this rule, every Mine Worker at said mines, except those who continue to work, shall have deducted from his or their earnings the sum of two dollars per day

for each part of a day they may remain idle. Should any operator or his representative lock the men out for the purpose of forcing a settlement of any grievance, or cause the mine to shut down in violation of this rule, he shall be fined two dollars per Mine Worker for each day or part of a day the mine is thus thrown idle."

* * * * *

"Irregular Work

* * * * *

"When any Mine Worker absents himself from his work for a period of two days without the consent of the Operator, other than because of proven sickness, he may be discharged. If a man persists in working irregularly he may be discharged. When a Machine Runner or any Mine Worker upon whose work other employees are dependent, absents himself from work without giving advance notice to the Mine Foreman, he shall forfeit his position."

* * * * *

"Settlement of Disputes

"Should differences arise between the Mine Workers and the Operator as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at any mine, there should be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately."

* * * * *

"Pending the hearing of disputes, the Mine Workers shall not cease work because of any dispute;"

* * * * *

"SIX DAY SUPPLEMENTAL AGREEMENT, EXECUTED FEBRUARY 11, 1943

"Memorandum of Agreement Between the United Mine Workers of America, International Union, and Southern Coal Producers' Association, Virginia Coal Association and Southern Appalachian Coal Operators Association.

"It is agreed that the current Joint Wage Agreement, known as the Southern Wage Agreement, and District Agreements subsidiary thereto, between the United Mine Workers of America and the before-named Associations, is amended and modified as follows:"

* * * * *

"B. The six day work week is authorized, provided that all individual mine workers working in excess of thirty-five hours any one week, beginning on Monday of each week, shall be paid time and one-half or rate and one-half for such work as the case may be. This arrangement shall cover day and monthly men, tonnage, yardage and dead work rates."

* * * * *

"This supplemental agreement, negotiated between the contracting parties signatory hereto, shall be in effect until the date of expiration of the basic Southern Wage Agreement, namely Midnight, March 31, 1943."

* * * * *

"NATIONAL BITUMINOUS COAL WAGE AGREEMENT
Effective April 1, 1945
Executed in the City of Washington, D. C.,
April 11, 1945

"THIS AGREEMENT, made this 11th day of April, 1945, between the Coal Operators and Associations signatory hereto, represented in the National Bituminous Coal

Wage Conference, parties of the first part, and the United Mine Workers of America, parties of the second part, covering all of the bituminous coal mines of the United States represented in said Conference, amends and supplements all agreements as herein provided. This Agreement carries forward and preserves the terms and conditions contained in all Joint Wage Agreements effective April 1, 1941, to March 31, 1943, the Supplemental Agreement providing for the Six-Day Workweek, and all of the various District Agreements executed between the United Mine Workers of America and the various coal associations and coal companies (based upon the aforesaid basic agreement) as they existed on March 31, 1943, and as amended and supplemented by the Agreement herein set out."

* * * * *

"For the duration of this Agreement no strikes shall be called or maintained hereunder."

* * * * *

"NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950

"THIS AGREEMENT, made this 5th day of March, 1950, by and between the coal operators and associations signatory hereto hereinafter referred to as Operators, parties of the first part, and the International Union, United Mine Workers of America, hereinafter referred to as Mine Workers, on behalf of each member thereof, party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements previous agreements as herein provided. This Agreement (subject to the amendments, modifications and supplements as hereinafter provided)

carries forward and preserves the terms and conditions of the Appalachian Joint Wage Agreement (dated June 19, 1941) effective April 1, 1941, to March 31, 1943, the Supplemental Six Day Work Week Agreement, the National Bituminous Coal Wage Agreement (dated April 11, 1945) effective April 1, 1945, and all the various District Agreements executed between the United Mine Workers of America and the various Operators and Coal Associations (based upon the aforesaid basic agreements) as they existed on March 31, 1946, subject to the terms and conditions of this Agreement and as amended, modified and supplemented by this Agreement as herein set out."

* * * * *

"This provision does not change the rules or practices of the industry pertaining to management. The Mine Workers intend no intrusion upon the rights of management as heretofore practiced and understood. It is the intent and purpose of the parties hereto that this agreement will promote and improve industrial and economic relationship in the bituminous coal industry and to set forth herein the basic agreements covering rates of pay, hours of work and conditions of employment to be observed between the parties, and shall cover the employment of persons employed in the bituminous coal mines covered by this Agreement."

* * * * *

"District Agreements

"New District of the United Mine Workers of America may be established.

"This Agreement supercedes all existing and previous contracts except as incorporated and carried forward herein by reference; and all local agreements, rules, regu-

lations and customs heretofore established in conflict with this Agreement are hereby abolished. Prior practice and custom not in conflict with this Agreement may be continued, but any provisions in District or Local Agreements providing for the levying, assessing or collecting of fines or providing for 'no strike,' 'indemnity' or 'guarantee' clauses or provisions are hereby expressly repealed and shall not be applicable during the term of this Agreement. Wherever a conflict arises between this Agreement and any District or Local Agreement, this Agreement shall prevail. When day men are transferred to loading coal the individual affected, if aggrieved, shall have the right of review under the settlement of disputes procedures provided in this Agreement.

"No District Contract or Agreement negotiated hereunder shall become effective until approval of such Contract or Agreement by the International Union, United Mine Workers of America, has been first obtained."

* * * * *

"Settlement of Local and District Disputes

"Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately:

"1. Between the aggrieved party and the mine management.

"2. Through the management of the mine and the Mine Committee.

"3. Through District representatives of the United

Mine Workers of America and a commissioner representative (where employed) of the coal company.

"4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

"5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

"A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement."

* * * * *

"Miscellaneous

"1. Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any 'no strike' or 'penalty' clause or clauses, or any clause denominated 'Illegal Suspension of Work' are hereby rescinded, cancelled, abrogated and made null and void."

* * * * *

"3. The contracting parties agree that, as a part of the consideration of this contract, any and all disputes, stoppages, suspensions of work and any and all claims, de-

mands or actions growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement; or, if national in character, by the full use of free collective bargaining as heretofore known and practiced in the industry.

"4. The United Mine Workers of America and the Operators signatory hereto affirm their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement.

"Termination of Agreement

"This agreement dated March 5, 1950, shall be effective as of March 5, 1950, and shall terminate June 30, 1952,"

* * * * *

"NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950 AS AMENDED SEPTEMBER 29, 1952 EFFECTIVE OCTOBER 1, 1952

"WHEREAS on January 18, 1951, and at various dates subsequent thereto, certain coal associations, companies and individuals (Generally referred to as 'Operators'), in their association, company and individual names and capacities, executed with the United Mine Workers of America an Agreement denominated 'National Bituminous Coal Wage Agreement of 1950 as Amended January 18th, 1951'; and said Operators, signatory to this Agreement, have now negotiated with the United Mine Work-

ers of America certain additional amendments to said 'National Bituminous Coal Wage Agreement of 1950' and it is the agreement and intent of all parties hereto to amend, and as amended, carry forward and preserve the terms and conditions of said 'National Bituminous Coal Wage Agreement of 1950' and all previous Agreements as therein provided:

"NOW, THEREFORE, THIS AGREEMENT made this 29th day of September, 1952, by and between the coal operators, associations, companies and individuals signatory hereto (hereinafter referred to as 'Operators'), as parties of the first part, and the International Union, United Mine Workers of America (hereinafter referred to as 'Mine Workers') on behalf of each member thereof, as party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements and, as amended, modified and supplemented, carries forward and preserves the terms and conditions of the 'National Bituminous Coal Wage Agreement of 1950' and all previous agreements as therein provided, such amendments, modifications and supplements being as follows, to wit:"

* * * * *

"MISCELLANEOUS

"Amend 'Miscellaneous' by striking out subsection 4 and amending subsection 3 to read as follows:

" '3. The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement unless national in character in which event the parties shall set-

tle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the Courts.' "

* * * * *

"NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950 AS AMENDED EFFECTIVE DECEMBER 1, 1958

"WHEREAS on September 29, 1952, and at various dates subsequent thereto, certain coal associations, companies and individuals (generally referred to as 'Operators'), in their association, company and individual names and capacities, executed with the United Mine Workers of America an Agreement denominated 'National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952'; and said Operators, signatory to this Agreement, have now negotiated with the United Mine Workers of America certain additional amendments to said 'National Bituminous Coal Wage Agreement of 1950' and it is the agreement and intent of all parties hereto to amend and supplement and as amended and supplemented to carry forward and preserve the terms and conditions of said 'National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952', said 'National Bituminous Coal Wage Agreement of 1950', and all previous Agreements as therein provided:

"NOW, THEREFORE, THIS AGREEMENT, effective December 1, 1958, by and between the coal operators, associations, companies and individuals signatory hereto and by and between such other and additional associations, com-

panies and individuals as may hereafter become signatory hereto (hereinafter referred to as 'Operators'), as parties of the first part, and the International Union, United Mine Workers of America (hereinafter referred to as 'Mine Workers') on behalf of each member thereof, as party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements and, as amended, modified and supplemented, carries forward and preserves the terms and conditions of the 'National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952', the 'National Bituminous Coal Wage Agreement of 1950' and all previous Agreements as therein provided, such amendments, modifications and supplements being as follows, to wit:"

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1,464.

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

BLUE DIAMOND COAL COMPANY, a corporation,
Respondent.

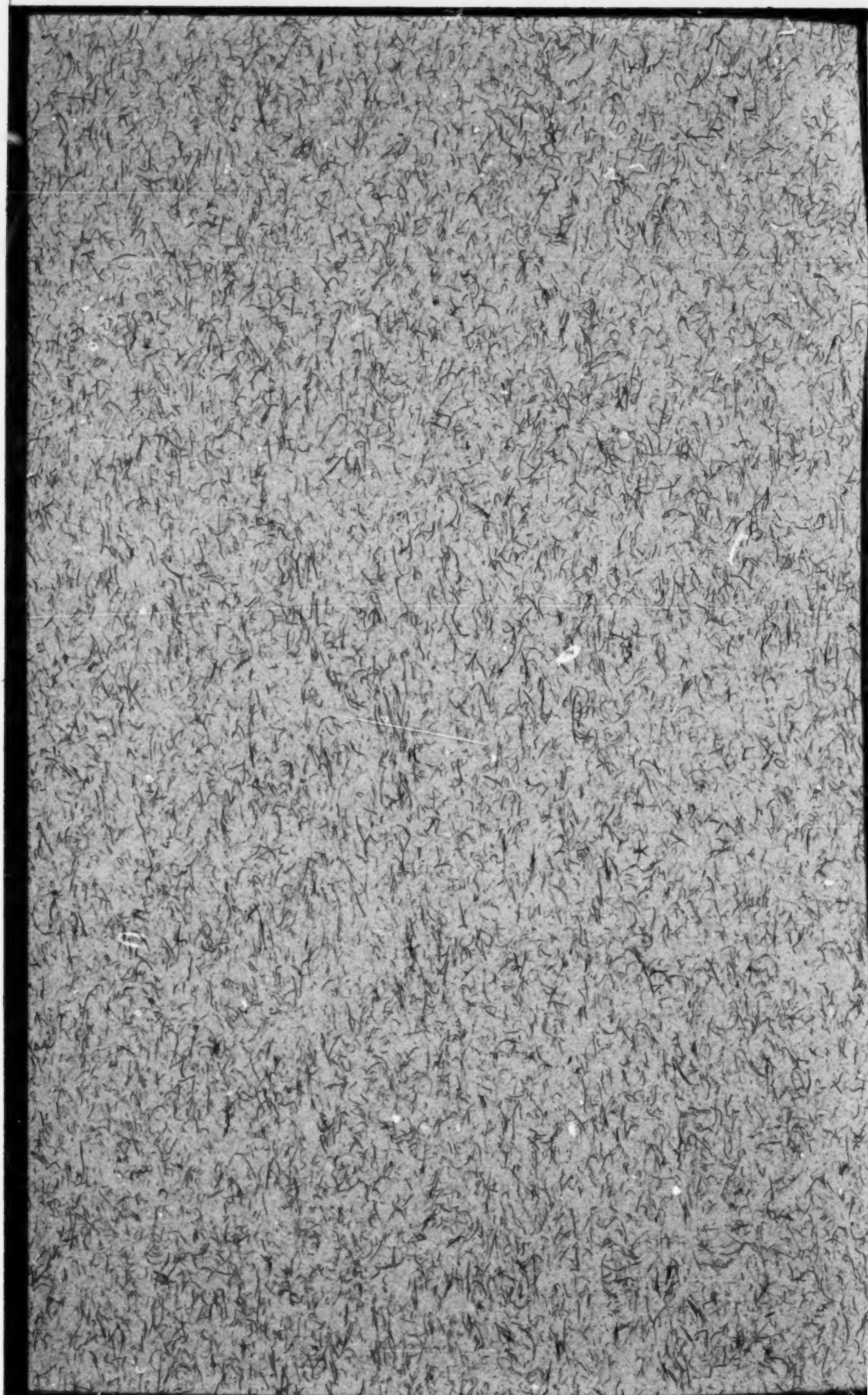
ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

JAMES S. GREENE, JR.,
Horton Bldg.,
Harlan, Kentucky 40831,

LOGAN E. PATTERSON,
Walnut Street,
Pineville, Kentucky 40977,
Counsel for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 696-6547



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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1,464.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

v.

BLUE DIAMOND COAL COMPANY, a corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, Blue Diamond Coal Company, a corporation, in opposition to the petition for writ of certiorari filed herein, respectfully represents:

OPINION BELOW.

The opinion of the Sixth Circuit, below, is reported in 436 F.2d 551.

QUESTIONS PRESENTED.

1. Will certiorari be granted to enable this Court to review and evaluate conflicting evidence presented in the trial court, and to decide factual issues, de novo, based upon that review and evaluation?

2. The trial court and the appellate court having considered the union's complaints as to instructions, and having found that no prejudicial error was committed, is the union's continuing complaint of errors in instructions of such public concern as to warrant the granting of certiorari and further review by this Court?

3. Will certiorari be granted to reconsider the now well established rule that a strike to resolve a dispute made arbitrable by contract is a breach of that contract?

STATEMENT OF THE CASE.

Scattered throughout the petitioner's Statement of the Case is a recital of alleged facts, often inferred to be, and sometimes alleged to be "uncontradicted."

Feeling that there are inaccuracies and omissions in the petitioner's Statement, the respondent would respectfully direct the attention of the Court to some additional facts related by the Court of Appeals (A. 10a-15a),[1] to which the respondent has appended record references for a test of accuracy:

"The evidence showed that for some five years prior to February, 1962, there had been but one work stoppage by Blue Diamond employees at Leatherwood No. 1. That occurred in 1959 when its employees joined other miners for two days in picketing non-union mines (T. 61). Contrasted with this experience, commencing in February, 1962, and continuing into January, 1963, Blue Diamond was harassed by work stoppages in the commencement and continuance of which the officers of the International allegedly played such a part as amounted to breaches of the union's contract with Blue Diamond (T. 63, 67 et seq.).

* * * * *

"Across the hollow from Leatherwood mine No. 2 was a mine owned by Blair Fork Coal Company, a subsidiary of Blue Diamond (T. 65-66). On February 5, 1962, the UMW filed with the National Labor Relations Board a charge, signed by Bill Perkins, asserting that Blair Fork Coal Company was encouraging its employees to join the Southern Labor Union, a rival of UMW (T. 799). On February 28, 1962, Beane, District President of UMW, talking to the man in charge of Blue Diamond's labor

---

[1] The respondent is adopting the system of reference adopted by petitioner as set forth on page 2 of the petition.

relations, said that he, Beane, wished to cooperate with Blue Diamond, but if he ever found out that Blue Diamond was involved in the Blair Fork Coal Company mine, he did not know whether or not there was going to be any further cooperation between the Union and Blue Diamond (T. 65).

"Another witness for the company who heard Beane's statement of February 28, 1962, gave this recital of them:

> " 'He stated that there had been cooperation between the U.M.W. and Blue Diamond Coal Company, but he had heard rumors to the extent that Blue Diamond Coal Company had acquired some adjacent property, Blair Fork by name; and that they were attempting to run it as a scab mine or something of that nature. He said he was checking into this and if he found out that it was so that all cooperation would cease, and he stressed again that he was looking into it and intended to find out'." (T. 113)

* * * * *

"Thereafter, on May 21, 1962, one John Slyger, a loading operator at Blue Diamond's Leatherwood No. 1 mine, refused to operate a loader without a helper and was discharged (T. 67-68). A general strike at Leatherwood No. 1 followed on May 22 and 23 (T. 67). Thereafter, the men returned to work and the initial steps of the grievance procedure were taken to resolve the validity of Slyger's discharge (T. 69). On May 28, representatives of the union and the company met as the third step of the procedure. Perkins, representative of the International for District 30, came to the meeting accompanied by the local union's mine committee and its President. Upon his arrival, Perkins said to the company representatives, "I can save a whole lot of time if you will answer one question for me * * *. Are you going to put him [Slyger] back to work?" Upon receiving a negative reply, Perkins,

with the mine committee and President, left without further discussion (T. 69). A general strike followed the next morning, May 29, and continued through five days, ending on June 4 (T. 70).

"On August 20, 1962, Perkins was again present at a meeting which included representatives of the local union, as well as the company representatives (T. 70). There was a discussion relative to shift seniority. Perkins was described as being in an angry mood, and asked the company people, "Where is your chain?" This question was apparently prompted by the fact that at a mine known as the Scotia Coal Company mine, owned by Blue Diamond, Perkins was frustrated in his efforts to organize the miners there employed by a chain across the mine's entrance. The personnel director of Blue Diamond gave this account of the additional remarks of Perkins:

> 'I didn't say anything and we went on in the meeting and he kept talking and he said that in the past he had instructed the Committee and the men there to cooperate with us and to work overtime when we needed it, but since we wouldn't let him go in on the property over at our Scotia Coal Company mine above Cumberland to organize the men that he was instructing the Committee right then and there in front of us that there wouldn't be no more overtime work and there would be no more cooperation and he said, "It looks like it is going to be a fight to the finish, and we are going to go down fighting." And Mr. Sheets asked him if not working overtime wasn't against the contract, and he said, "To hell with the contract." ' (T. 70-71)

"Another company representative told it this way:

> 'He [Perkins] was real angry and he asked us as we went into the office, "Where in the H--- the chains were" and I didn't know what he was talking about and he said all he had been able to do for some time

was to get chains and guards; that he had been to this property that we owned and had tried to get in on this property and organize the men there and talk to them, and he said he hadn't even had a chance to get on the property to talk to them and he was extremely angry about it. He said if that was the attitude that the Company was going to use, that he wanted us to know there and then that there would be no more cooperation from the U.M.W. He said at one time that he had instructed the tipple especially to work overtime in order to help us out and asked the men to work overtime to help us out; but he said, "I want you to know that has ended," and he instructed the Mine Committee and the Local officers that were there in my presence and told them—he said, "From now on, there will be more (sic) overtime work at this mine. I want that understood." And he turned to me and said, "If you fire one of these men for this," he said, "We will strike." And I asked him, I said, "Mr. Perkins, isn't this against the contract?" And he said, "To hell with the contract," and with that the meeting was terminated.' (T. 118)

"Following the August 20 meeting, just described, there was a one-half day work stoppage on August 24, 1962 (T. 71).

* * * * *

"On October 1, 1962, there was another work stoppage for a single day, apparently because of work performed by a foreman (T. 72).

* * * * *

"Beginning on December 3, 1962, there was another strike lasting five days (T. 73). Following this, there was a work stoppage beginning January 8, 1963, which lasted through fourteen working days (T. 73-74). These work stoppages were allegedly the result of the workers at Blue Diamond's Leatherwood No. 1 mine refusing to cross

picket lines thrown about that mine by so-called roving pickets, miners who had been employed at Blue Diamond's Leatherwood Mine No. 2. This activity followed Blue Diamond's cancellation of its contract with UMW covering its employees at Leatherwood Mine No. 2. There was evidence to resist Blue Diamond's cancellation of the contract at Leatherwood No. 2, employees there would come over and picket Leatherwood No. 1, whose men would not cross the picket line thrown up by Leatherwood No. 2 miners. The No. 1 miners would then go over and picket mine No. 2 (T. 242, 284-285). There was evidence that during this activity Perkins, very much in evidence, was talking to the pickets and otherwise participating in what was going on (T. 210-211). He testified that he attempted to get the employees of No. 1 to go back to work. However, there was evidence by former members of the UMW who had taken part in these strikes that Perkins would say to the strikers, "My job is to tell you fellows to go back to work" (T. 231), but this would be coupled with the further advice that, "You could read between the lines" (T. 209, 240-241). A variation of this was that they—the strikers—"ought to know what to do" (T. 231). Miners giving this testimony emphasized that the statements of Perkins were understood as suggestions that the miners should continue their strike or at least that Perkins would go along with it (T. 231, 241). One witness put it this way when asked the meaning of Perkins' "you know what to do." "Meant I didn't work, stayed on strike" (T. 274).

THE ARGUMENT.

1.

Will certiorari be granted to enable this Court to review and evaluate conflicting evidence presented in the trial court, and to decide factual issues, de novo, based upon that review and evaluation?

Somewhat dispersed, but comprising more than one-half the petition for certiorari, is the contention that there was no evidence upon the trial to support the verdict and judgment rendered and entered in the trial court. This is presented in a number of assertions, among them: The testimony for respondent was disputed by "uncontradicted" evidence; the petitioner did not participate in the strikes at the respondent's mine; the strikes were "wildcat" ones, involving no obligation to resort to grievance procedure; and, local officers and representatives were not the "agents" of the petitioner.

As heretofore pointed out, there was considerable evidence in contradiction of these contentions.

In 1925, in the case of *United States v. Johnston,* 268 U.S. 220, 227, this Court, through Mr. Justice Holmes, declared:

> "We do not grant certiorari to review evidence and discuss specific facts."

In *General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175, 178, a suit involving infringement of patents, this Court said: "Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

In *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company,* 312 U.S. 592, *Kennedy v. Silas*

Mason Co., 334 U.S. 249, and in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, this Court expressed its caution and reluctance in the realm of fact finding, and with a passing remark in *Thomas v. State of Arizona*, 356 U.S. 390, 393 it recognized the continuing validity of "the traditional jury function." In *Thomas* it was also said, "Whatever the merits of this dispute, our inquiry clearly is limited to a study of the *undisputed* portions of the record." (356 U.S. 402).

Though never specifically overruling *United States v. Johnston*, by the time the Court reached *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500 and *Sentilles v. Inter-Caribbean Shipping Corporation*, 361 U.S. 107, the Court was obviously divided in opinion as to departure from the general principle laid down in *Johnston*.

In *Rogers*, an action under the Federal Employers' Liability Act, a jury awarded damages to the plaintiff. The Supreme Court of Missouri reversed on the grounds that the evidence did not support the verdict. After granting certiorari, a majority of this Court reached the conclusion that there was evidence sufficient to support a finding for the plaintiff, and that the Missouri Court had been in error in its reversal. Mr. Justice Frankfurter dissented, alluding to *Johnston*, and saying (352 U.S. 537) "The rule that the Court does not grant certiorari to review evidence is a wise rule, indeed indispensable to the work of the Court, and is as equally applicable to negligence cases as to any other type of case." Mr. Justice Harlan concurred in the view that certiorari should not have been granted, but was of the opinion that, since the writ had been issued, it became the duty of the Court to inquire into the merits of the case.

Sentilles was an action by a seaman against a ship owner, and was predicated on the Jones Act. A jury

rendered a verdict for the plaintiff. The Court of Appeals felt that the evidence did not justify the jury's conclusion, and therefore reversed. A majority of this Court, after reviewing the evidence, decided that the Court of Appeals was in error. In the opinion it was said (361 U.S. 110):

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. * * * The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Even with a Court divided in opinion, neither position is of any comfort to the petitioner here. It appears to be the opinion of some of the members of the Court that certiorari should not be granted at all for the mere purpose of reviewing evidence and finding facts. This postulate does nothing for the petitioner. Other Justices feel that some cases justify a review of the evidence and that a jury should be permitted "to select from among conflicting inferences and conclusions that which it considers most reasonable." Neither would this conviction justify the granting of certiorari in the present case, where, as pointed out, conflicting evidence could justify conflicting inferences and conclusions.

The petitioner suggests that "when there is a complete absence of probative facts to support the conclusion reached" by the jury, reversible error exists. This sug-

gestion will not bear analysis. Mr. Beane was "President and International Board Member of the United Mine Workers, District 30 (T. 338). The officers of District 30 were appointed by the International Union (T. 338). In 1962, Mr. Bill Perkins was "an International Representative assigned to District 30" and he was the only one in the District (T. 339). The International Union was supreme, and its policies prevailed over those of the District (T. 339-340). Both Mr. Beane and Mr. Perkins were paid by the International Union (T. 349). Mr. Perkins was dispatched, as a representative of the International Union, to consult with and advise the employees regarding strikes (T. 350).

It was denied, of course, but there was proof that Mr. Beane threatened the respondent with trouble (T. 65, 113); that trouble promptly followed (T. 67 et seq.); that Perkins was on the scene much of the time (T. 63, 69, 70, 207, 210-211); that he gave the employees a tongue-in-cheek admonition to go to work, coupling it with statements to the effect that they could "read between the lines" (T. 207) or that they "ought to know what to do" (T. 231). Similar evidence in *Lewis vs. Benedict Coal Corporation,* 259 F.2d 346, 351-352; 361 U.S. 459, 464 (affirmed on a divided Court) was considered sufficient to form a jury issue.

2.

The trial court and the appellate court having considered the union's complaints as to instructions, and having found that no prejudicial error was committed, is the union's continuing complaint of errors in instructions of such public concern as to warrant the granting of certiorari and further review by this Court?

The Union's complaint about the trial court's refusal to give its offered instructions 1 and 4 (that the strikes were not a violation of the agreement) is based entirely upon its untenable contention as to the applicable law, and this contention is answered in the argument under Question 3 herein.

Its complaint as to the refusal of the trial court to give its offered instruction on "preponderance of the evidence" is fully answered by the Sixth Circuit, both in the opinion of Senior Circuit Judge O'Sullivan, and the concurring opinion of Circuit Judges McCree and Celebrezze (A. 23a-27a, 28a-29a).

Judge O'Sullivan reached the conclusion that, since the requested instruction is not required by the United States Constitution, or by any act of Congress, including the Labor Management Relations Act of 1947, it was proper for the trial court to instruct the jury on plaintiff's burden under the Kentucky rule (A. 26a-27a). Judge O'Sullivan also pointed out that "telling a jury, 'If you believe from the evidence' may actually require a greater burden of proof than 'by a preponderance of the evidence,' " and concluded that "the difference between Kentucky's rule and the more conventional style of instruction is not such that the use of the Kentucky style in this case denied appellant any 'substantial right.' " Also noteworthy is the fact that the trial court also told the jury

"unless you so believe the defendant Union breached its contract, you should find for the defendant," thus stressing the necessity of conviction "from the evidence" (T. 1191).

Judge McCree, in his concurring opinion (joined by Judge Celebrezze) also concluded "that the court below did not prejudice appellant by using the Kentucky burden of proof jury instructions. The requirement that the jurors 'believe from the evidence' in effect requires that they be persuaded by the weight of the evidence" (A. 29a).

The other instructions, given or refused, of which complaint is made by the Union, relate entirely to the evidence in this particular case.

The Union complains of error in the trial court's rejection of its proffered instructions 2 and 3, which would have told the jury that the Union was not liable for its member's acts merely by virtue of membership, or for spontaneous and wildcat strikes. In truth, the complaint of the Union is not that this point was not covered in the instructions of the trial court, but that the trial court failed to adopt the exact language used in the offered instructions. In the Sixth Circuit opinion, a portion of the trial court's instructions covering this point are quoted and approved as being adequate (A. 9a, 23a). This quotation is taken from the following portion of the instructions on the issue of agency and responsibility of the Union (T. 1191-1193):

> "With respect to the responsibility of the International Union for the acts of its representatives and officers, you are instructed that a labor union can [1192] act only through its officers and agents and it is only responsible for the acts by its officers and agents done within the scope of their authority or employment.
>
> "An agent is one who, by the authority of his principal, transacts his principal's business, or part

of it, and represents his principal in dealing with third parties. This fact of agency must be proved by the evidence the same as any other fact in the case.

"This suit is against the United Mine Workers of America. The local union is not a party to the contract, nor is it being sued in this action. Defendant United Mine Workers of America would not be liable for the action of the officers or individual members of the local union unless it is shown the United Mine Workers of America authorized, participated in, or ratified the acts of the local union or individual members after express knowledge of such acts, which are claimed to be violations of the contract.

"You should not infer ratification by United Mine Workers of any work stoppage on the part of the local union from the fact that defendant United Mine Workers of America involved itself in the dispute giving rise to such stoppage after it occurred. National labor policy requires that national unions be encouraged to exercise a restraining influence on [1193] strike situations and they should not be made liable for such harm as may already have been done."

The Union complains of error in the trial court's rejection of its proffered instruction 8, under which the jury would have been specifically told that remote, uncertain or speculative damages could not be recovered. This claim of error is specifically dealt with in the Sixth Circuit opinion, wherein it is pointed out that the trial court, in its charge, limited the damages recoverable to such as the jury should believe from the evidence were suffered by Blue Diamond "as a direct result of the defendant's breach of the contract as above conditioned and described" and that if the jury believed Blue Diamond entitled to recover on its claim for loss of production by reason of the strikes referred to in the evidence, then the jury should award it "such a sum in damages as you may

find from the evidence will fairly and reasonably compensate plaintiff for the loss of profits it is reasonably certain it would have made in its coal mining operation but for the occurrence of said strikes" (A. 22a). The court concluded "that the jury was correctly instructed on the matter of damages" (A. 22a).

The language of a charge is for the trial court to determine and, if, from the entire charge, the language used conveys to the jury in clear and correct fashion the applicable law, that is all that is required. *United States v. Trenton Potteries Company,* 273 U.S. 392, 396; *Shaw v. Lauritzen,* 3 Cir., 428 F.2d 247, 251; *Nowell v. Dick,* 5 Cir., 413 F.2d 1204, 1211; *James v. Continental Insurance Company,* 3 Cir., 424 F.2d 1064, 1065. The District Court and the Sixth Circuit, in fully reviewing the Union's complaint of errors in the instructions, found that the charge of the trial court in this case satisfied the requirements of this test.

3.

Will certiorari be granted to reconsider the now well established rule that a strike to resolve a dispute made arbitrable by contract, is a breach of that contract?

In *Lewis v. Benedict Coal Corporation,* 259 F.2d 346, it was held that a strike to resolve a dispute made arbitrable by contract constituted an actionable breach of contract. That holding was affirmed upon an equally divided Court (361 U.S. 459). In the course of that litigation it was urged that inasmuch as "no strike" and "penalty" clauses had been removed from previous contracts, those deletions established an unfettered right to strike, even though the contract provided for a resolution of all disputes by procedures involving arbitration. Overruling

that contention, it was held "that a strike to settle a dispute which a collective bargaining agreement provided shall be settled by an exclusive and obligatory alternative procedure constitutes a violation of the agreement." (259 F.2d 351).

The same question and the same contention was presented in *Local 174, Teamsters etc. v. Lucas Flour Company,* 369 U.S. 95. It was there said (369 U.S. 104-105):

> "Whether, as a matter of federal law, the strike which the union called was a violation of the collective bargaining contract is thus the ultimate issue which this case presents. It is argued that there could be no violation in the absence of a no-strike clause in the contract explicitly covering the subject of the dispute over which the strike was called. We disagree.
>
> "The collective bargaining contract expressly imposed upon both parties the duty of submitting the dispute in question to final and binding arbitration. In a consistent course of decisions the Courts of Appeals of at least five Federal Circuits have held that a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement. The National Labor Relations Board has reached the same conclusion. W. L. Mead, Inc., 113 N.L.R.B. 1040. We approve that doctrine. To hold otherwise would obviously do violence to accepted principles of traditional contract law. Even more in point, a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare."

This Court repeated this principle in *Boys Markets, Inc. v. Retail Clerk's Union, Local 770,* 90 S. Ct. 1583, 1591 (____ U.S. ____). In this case the Court re-affirmed the holding thus:

"As we have previously indicated, a no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration."

In a footnote, the Court observed:

"We held in Local 174, Teamsters, etc. v. Lucas Flour Co., *supra,* that, even in the absence of an express no-strike clause in the collective bargaining contract, an agreement that certain disputes 'will be exclusively covered by compulsory terminal arbitration' (369 U.S., at 106, 82 S. Ct., at 578) gives rise to an implied promise by the Union not to strike during the term of the contract in response to these arbitrable disputes."

The petitioner is now saying that this Court and all of the lower courts have been wrong about this proposition all along, and in support of its contention, it refers to *National Labor Relations Board v. Lion Oil Co.,* 352 U.S. 282, and to *Garmeada Coal Co. v. International Union, UMWA,* 230 F.2d 945.

Lion Oil was not the same sort of case. That action involved an inquiry as to whether or not a strike following the expiration of a sixty-day notice of a desire to modify a contract, but prior to the terminal date of the entire contract, constituted an unfair labor practice as a violation of Section 8(d)(4) of the National Labor Relations Act. Aside from the fact that *Benedict* and *Lucas* followed this case, it might be noted in passing that in *Lion* the Court adhered to the proposition that a refusal to work "midway in a fixed-term contract which did not provide for modifications during its term" justified an employer "in discharging the employees."

In *Garmeada,* tried without a jury, the trial court found, from conflicting evidence, that the union did not

instigate nor prolong the strike. In this case, upon conflicting evidence, the jury found to the contrary.

Petitioner lays some stress upon the fact that the 1950 Wage Agreement was amended in 1952 by expunging the provision that stoppages were to be "settled and determined *exclusively* by" the grievance procedures. This emphasis could lead to the erroneous impression that the wage agreement in *Benedict* was different from the wage agreement now under consideration.

The pertinent provisions of the wage agreement in *Benedict* were precisely the same as in this litigation, as may be seen by examining the footnote to *Benedict* (259 F.2d 350) and page 46a of the appendix to the petition for writ of certiorari. In fact, petitioner concedes this to be true (petition, p. 31).

CONCLUSION.

The respondent believes itself entitled to a denial of the Petition for Writ of Certiorari herein presented.

Respectfully submitted,

JAMES S. GREENE, JR.,
Harlan, Kentucky,

LOGAN E. PATTERSON,
Pineville, Kentucky,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1464

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

BLUE DIAMOND COAL COMPANY, A CORPORATION
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO OPPOSITION BRIEF

EDWARD L. CAREY
HARRISON COMBS
WILLARD P. OWENS
900 Fifteenth Street, N.W.
Washington, D. C. 20005
H. B. NOBLE
304 Main Street
Hazard, Kentucky 41701
M. E. BOIARSKY
512 Kanawha Valley Building
Charleston, W. Va. 25301
Attorneys for Petitioner, United Mine Workers of America

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1464

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

BLUE DIAMOND COAL COMPANY, A CORPORATION
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO OPPOSITION BRIEF

UMW'S REPLY TO RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED

Respondent's brief (p. 2) contains its statement of Questions Presented. UMW submits that Questions Presented by UMW (Pet. 2-4) appropriately sets forth the questions involved herein.

UMW'S REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent's brief (pp. 3-7),[1] charging Petitioner with inaccuracies and omissions in its statement of the case,

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[1]Page references to Respondent's opposition brief are referred to herein as "O.B." followed by a page number. Otherwise, references and abbreviations used herein are the same as were employed in footnotes 1 and 2 of the instant Petition for Writ of Certiorari.

quotes (O.B. 3-4) from the Sixth Circuit's opinion as it appears in the Appendix to the certiorari petition, at pages 10-15a, which covers six work stoppages; but Respondent *assiduously fails to tell this Court, as Petitioner recites in its certiorari petition* (Pet. 13-14; A. 16a), *that the Sixth Circuit exonerated UMW from liability for the work stoppages occurring on May 22-23, August 24, and October 1, all 1962,* declaring that "as to the two-day stoppage on May 22 and May 23, 1962, the one-half day stoppage on August 24, 1962, and the one-day stoppage on October 1, 1962, *there was not sufficient evidence from which a jury could find that they were otherwise than spontaneous stoppages, not chargeable to" UMW* (Pet. 14; A. 16a).[2] *This quotation is found in the paragraph next following the language quoted by Respondent in its opposition brief.*

Thus, in view of the Sixth Circuit's resolution of UMW's non-liability as to the three work stoppages, UMW regarded not only as unnecessary, but as irrelevant, any factual recitals concerning the noted three work stoppages.[3]

The Sixth Circuit's reference to Blair Fork Coal Company and to the statement of C. E. Beane, District 30's President, of alleged non-cooperation (A. 11-12a; O.B. 3-4) occurred in *February, 1962* and *antedated* the first of the six work stoppages, which as the Sixth Circuit's

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[2]This was consonant with the Sixth Circuit's holding that, "Nothing herein is intended to hold that the bargaining contract should be read as imposing liability upon UMW for spontaneous or wildcat strikes in which it had no part by way of causing or prolonging such strikes" (A. 9A).

[3]The May 22-23, 1962 stoppage is discussed in the Sixth Circuit's opinion quoted on pages 3-4 of the opposition brief; discussion of the August 24, 1962 stoppage, in the Sixth Circuit's language, is found in the opposition brief at pages 5-6; and the October 1, 1962 stoppage, as quoted from the Sixth Circuit's opinion, is dealt with on page 6 of the opposition brief.

opinion recites, occurred on May 22 and 23 and followed the refusal of John Slyger, a Blue Diamond loading operator, to operate a loader without a helper on May 21 and was discharged (A. 12a); and as the Sixth Circuit further stated (A. 12a), "the men returned to work and the initial steps of the grievance procedure were taken to resolve the validity of Slyger's discharge." Indeed, under the grievance procedure, the arbitrator found Slyger's complaint to have legitimacy (T. 100-07). Neither the Sixth Circuit's opinion nor Respondent's brief herein contended there was any evidence which connected Slyger's complaint or the work stoppage with a request from Beane, or that Slyger knew of Beane's alleged statement. *Significantly, as already indicated, the Sixth Circuit rejected the jury's finding that UMW was responsible for the stoppage on May 22-23* (A. 16a). Further challenge to the alleged non-cooperation statement is the uncontradicted testimony of a *Blue Diamond* witness that numerous grievances followed the February, 1962 meeting in May, October and November, 1962, September, 1963, and February, 1964, which were settled under the grievance machinery procedures and *did not involve work stoppages* (T. 363-71).

With reference to the August 24, 1962 stoppage, it must be noted in appraising the validity of Respondent's charge of omissions and inaccuracies that, in quoting the Sixth Circuit's opinion (O. B. 6), Respondent omitted—and obviously deliberately so—the Sixth Circuit's further statement that, "While plaintiff argues that this was a way of emphasizing Perkins' 'to hell with the contract' statement of August 20, *we feel this one-half day work stoppage cannot be charged to defendant*" (A. 14a).

Similarly, with obvious deliberate calculation, in deal-

ing with the October 1, 1962 stoppage, Respondent has omitted from the Sixth Circuit's opinion (O.B. 6), the further language that, "While there was no grievance procedure invoked, *there is no evidence upon which responsibility for it could be placed on the International*" (A. 14a).

UMW submits that fairness to this Court would have compelled Respondent to have included in—and not omitted from—its quotations from the Sixth Circuit's opinion those portions wherein the Sixth Circuit *exculpated UMW from responsibility* as to the three stoppages above noted.

On the other hand, as to the work stoppages for which UMW was held liable by the Sixth Circuit, UMW's petition (pp. 14-19) dealt therewith in full detail.

To dispel completely the charge of omissions and inaccuracies, UMW invites this Court's comparison of the Sixth Circuit's recitals concerning the May 29-June 4, 1962 stoppages (found in the opposition brief, pp. 4-5) with UMW's discussion thereof in its petition (pp. 14-15), and a comparison of the Sixth Circuit's factual recitals concerning the December 3, 1962 and January 8, 1963 stoppages (found in the opposition brief, pp. 6-7) with UMW's discussion thereof in its petition (pp. 15-19). UMW submits these comparisons will demonstrate Respondent's charge of omissions and inaccuracies to be an abortive one.

UMW'S REPLY TO RESPONDENT'S ARGUMENTS

ARGUMENT 1—CONCERNING THE JURY ISSUE

Criticism of the Sixth Circuit's imprimatur of the jury's verdict is discussed in the certiorari petition (pp. 41-49). Significantly, Respondent challenges none of UMW's charged conflicts and errors.

Respondent subtly initiates its argument against this Court's granting certiorari herein by asserting disinclination by this Court's minority to grant certiorari to review evidence and discuss specific facts (O.B. 8-11). However, the sanctioned jury verdict based upon Section 301 of the Labor Management Relations Act, 1947, as amended (called "Act"), involves important phases of national labor policy, among them, the critical question of whether UMW, in its 1958 Agreement, waived its right to strike either totally or partially; whether the sanctioned verdict resulted from erroneous jury instructions; whether, in imputing liability to UMW, the Sixth Circuit's approval collides with and ignores guidelines of prior important decisions of this Court and other Federal courts; whether the Sixth Circuit's action conflicts with its own decisions; whether it is erroneous; and whether it presents a "threat to the goal of uniformity" [*Hanna* v. *Plumer, 380 U.S. 460, 463 (1965)*].

Thus, the instant certiorari petition is not one presenting baldly the issue of reviewing evidence and discussing specific facts. To the contrary, it presents important questions of significance in the *construction of Federal law,* and whether the jury function has been respected under applicable legal principles in relation to national labor policy. See the concurrence of Mr. Justice Douglas in *Wilkerson* v. *McCarthy,* 336 U.S. 53, 70-71. Award of certiorari, under a comparable situation, is found in *UMWA* v. *Gibbs,* 383 U.S. 715 (1966).

ARGUMENT 2—INSTRUCTIONS

UMW believes its certiorari petition (pp. 36-41) adequately answers Respondent's Argument 2 (O.B. 12-15), which deals with Instructions. UMW's Reason I for granting the Writ (Pet. 25-34) adequately demonstrates the

Sixth Circuit's error in approving the district court's rejection of UMW's Proffered Instructions 1 and 4, dealing with the right to strike under the 1958 Agreement.

Similarly, UMW's response to Respondent's employment (O.B. 12-13) of opinions of Senior Circuit Judge O'Sullivan and of Circuit Judges McCree and Celebrezze to justify the district court's refusal to give UMW's Proffered Instructions on "preponderance of the evidence" is found in the certiorari petition (pp. 36-39).

Respondent's claim (O.B. 13-14) that the Sixth Circuit properly approved the district court's refusal to give UMW's Proffered Instructions 2 and 3 is fully answered in the certiorari petition (pp. 39-40). These instructions would have told the jury that UMW is not liable for its members' acts merely by virtue of membership, or for spontaneous and wildcat strikes. Respondent's statement (O.B. 13) that UMW's complaint "is not that this point was not covered" in the trial court's instructions, is countered by UMW assertions in its petition (pp. 22, 39) that though Proffered Instructions 2 and 3 accorded with the Sixth Circuit's holding in *Lewis* v. *Benedict Coal Corp.*, 6 Cir., 259 F.2d 346,[4] *the given "charge contained no instruction by which the jury could have known UMW was not responsible for wildcat strikes, and the jury was never instructed as to this vital defense"* (Pet. 22), and *"Since the jury charge no where contained UMW's theory of defense, as propounded in the proffered instructions, and there was evidence supporting UMW's theory, the Sixth Circuit's*

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[4]Indeed, in the instant action, as already noted (fn. 2, p. 2), the Sixth Circuit herein held that "Nothing herein is intended to hold that the bargaining contract should be read as imposing liability upon UMW for spontaneous or wildcat strikes in which it had no part by way of causing or prolonging such strikes" (A. 9a).

approval of the district court's rejection conflicts" with cases cited in the certiorari petition (pp. 39-40).

Answer to Respondent's efforts (O.B. 14-15) to justify the trial court's rejection of UMW's Proffered Instruction 8 on damages, and the Sixth Circuit's approval of such rejection, is found in the certiorari petition (pp. 40-41).

ARGUMENT 3—UMW'S CONTRACTUAL RIGHT TO STRIKE

Answers to Respondent's arguments concerning UMW's contractual right to strike appear in its certiorari petition (pp. 25-36). Additionally, UMW submits the following:

A. A Court Majority Has Never Approved the Sixth Circuit's Benedict Holding on UMW's Contractual Right to Strike.

In appraising Respondent's argument that certiorari should not be granted "to reconsider the now well-established rule that a strike to resolve a dispute made arbitrable by a contract, is a breach of that contract", it is to be remembered that while the Sixth Circuit's *Benedict* (259 F.2d 346) was affirmed, affirmance was, as Respondent states (O.B. 15), "upon an equally divided Court" [*Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960)] —purely a technical affirmance. The Sixth Circuit's *Benedict* has never received affirmance by a majority of this Court.

B. This Court's Equal Division in Benedict Was Limited to the 1950 Agreement.

Actually, this Court's affirmance related only to the National Bituminous Coal Wage Agreement of 1950, since as the certiorari petition (p. 10, fn. 7) shows, this Court limited review to the 1950 Agreement. In any event, interpretation of the *1952 Agreement* was not an

issue for this Court's consideration when validity of the Sixth Circuit's *Benedict* was before it (361 U.S. 459). Thus, Respondent's claim (O.B. 18) that *Benedict* involved the *1952 Agreement* is clearly inaccurate so far as this Court's affirmance of *Benedict* is concerned.

C. The Instant Case Concerns the 1952 and 1958 Agreements.

As UMW's certiorari petition emphasizes, the 1950 Agreement was changed through the process of collective bargaining. Like the 1950 Agreement, the 1952 and 1958 Agreements preserved the deletion and repeal of the "no strike" and related clauses in earlier collective bargaining agreements (Pet. 9-10). In addition, whereas the 1950 Agreement expressly provided that all *"stoppages"* shall be settled *"exclusively"* by the Agreement's machinery for settling disputes, the 1952 and 1958 Agreements *omitted* the words *"stoppages"* and *"exclusively"* and provided merely that "all disputes and claims" not settled by agreement were to be settled by such machinery (Pet. 27-29). The Sixth Circuit ignored the Agreements' omission of the word "stoppages" and did not consider as meangful elimination of the term "exclusively" in the 1952 and 1958 Agreements (A. 6a).

Inaccurate is Respondent's claim (O.B. 18) that UMW conceded (Pet. 31) the instant case involves the same wage agreement with which *Benedict* was concerned. Examination of UMW's statement discloses it pertained to the *1952 Agreement,* and its concession was that the *1958 Agreement* contained the identical provisions as the *1952 Agreement,* which, as the certiorari petition (p. 31) recites, was interpreted as not containing a no-strike clause by the District of Columbia Circuit in *Int. Union, UMWA* v. *NLRB,* 257 F.2d 211.

D. Respondent Fails to Show that the Sixth Circuit Holding Accords With National Labor Policy As Mandated by Congress and As Interpreted By This and Other Federal Courts and the NLRB.

Thus, the District of Columbia Circuit's holding not only challenges Respondent's characterization of the Sixth Circuit's *Benedict* (259 F.2d 346) as "the now well-established rule" (O.B. 15), *it emphasizes the current conflict with the Sixth Circuit's holding in the instant case.* Consonant with the District of Columbia Circuit's holding, *but in conflict with the Sixth Circuit's holding,* is the Third Circuit's assertion that UMW's collective bargaining agreement "did not contain a 'no-strike' provision" in *United States Steel Corporation* v. *UMWA, et al,* 3 Cir., 74 LRRM 2611, 2612 (June 30, 1970).

Inappositeness of *Teamsters* v. *Lucas Flour Co.,* 369 U. S. 95, relied upon by Respondent (O.B. 16), is demonstrated in the certiorari petition (p. 33). Additionally, the dissenting opinion therein stated the contract specifically provided agreement by both parties "that *during such arbitration, there shall be no suspension of work*" (369 U.S. 107)[5]. *Lucas Flour* must be interpreted in light of that specific contractual provision, as well as *Lucas Flour's* adoption (p. 105) of NLRB's doctrine in *W. L. Mead, Inc.,* 113 NLRB 1040, wherein "*the contract contained no explicit no-strike clause*" (p. 1042). UMW submits it is one situation when a bargaining agreement contains "no explicit no-strike clause"; but it is a totally different situation for contracting parties to a bargaining agreement, as in the instant case, to agree that previous no-strike or related clauses "are hereby rescinded,

[5]UMW's 1941 Agreement provided that "Pending the hearing of disputes, the Mine Workers shall not cease work because of any dispute"; but the 1958 Agreement expressly rescinded that clause and related clauses (Pet. 6-10).

cancelled, abrogated and made null and void" (Pet. 8). *Lucas Flour* proclaims the necessity of adherence "to accepted principles of traditional contract law" (p. 105). Implementation of that principle demonstrates the Sixth Circuit's conclusion emasculates the parties' agreement, contrary to this Court's holding that plain provisions of a valid contract may not be ignored. *Colgate-Palmolive Peet Co.* v. *NLRB*, 338 U.S. 355, 363. (See Pet. 29-30).

Respondent's reliance (O.B. 16-17) upon *The Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770*, 26 L. ed. 2d 199 (1970) is abortive. *Boys Markets* made clear its adherence to the dissent in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, which conceded that therein the unions had agreed that "[T]*here shall be no strikes . . . for any cause which is or may be the subject of a grievance*" (370 U.S. 228), and thus adoption in *Boys Markets* of *Sinclair's* dissent must be read in *pari materia* with the conceded fact that *Sinclair* contained an unquestionable no-strike clause on the union's part which, as already noted (*ante*, p. 9), differs from the instant situation.

Respondent's effort (O.B. 17) to render *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, inapplicable is without merit. If, as *Boys Markets* professes (26 L. ed 2d 210), "The literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to... §301(a)... and the purposes of arbitration", by like token similar accommodation must be accorded to the Act's Section 13, wherein Congress commanded that, "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike", and, as *Lion Oil* holds (352 U.S. 293): "Where there has been no express waiver of the right to strike,

a waiver of the right during such a period is not to be inferred." Thus, *Lion Oil's* applicability is not only manifest and real, but it accords with this Court's holding in *NLRB* v. *Drivers Local Union,* 362 U.S. 274 (1960) that Section 13 is a rule of construction which cautions against an expansive reading thereof "which would adversely affect the right to strike" and "is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation . . . which safeguards the right to strike . . ." (362 U.S. 282).

Respondent's attempts to distinguish the instant situation from *Garmeada Coal Co.* v. *Int. Union, UMWA,* 6 Cir., 230 F. 2d 945—discussed in the certiorari petition (p. 33)—by pointing to differences in results in the two cases (O.B. 17-18) is no answer to Petitioner's pointing out that the district court in *Garameada* reasoned that miners were *"pursuing their right to strike regardless of the provisions of the" 1950 Agreement,* which the Sixth Circuit affirmed.[6]

In its certiorari petition (p. 25 et seq.) UMW asserts the Sixth Circuit's holding as to the right to strike to conflict with national labor policy as expressed by Congress and with prior decisions of the federal judiciary and the NLRB. UMW's foregoing answers to Respondent's arguments (O. B. 15) abundantly demonstrate its failure to challenge UMW's contentions.

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[6]*Garmeada Coal Co.* v. *Int. Union, UMWA,* DC, E.D. Ky., 1954, 122 F. Supp. 512, 518.

CONCLUSION

For the reasons assigned in its Petition for Certiorari and herein, Petitioner prays that the Writ of Certiorari should be granted and that the Writ issue to review the opinion and judgment of the Sixth Circuit entered in Case No. 19,589. Petitioner intends to urge each of the points and questions presented, though not specificially argued in said petition or herein.

Respectfully submitted,

EDWARD L. CAREY
HARRISON COMBS
WILLARD P. OWENS
900 Fifteenth Street, N.W.
Washington, D. C. 20005

H. B. NOBLE
304 Main Street
Hazard, Kentucky 41701

M. E. BOIARSKY
512 Kanawha Valley Building
Charleston, W. Va. 25301

Attorneys for Petitioner, United Mine Workers of America

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